United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22574

321

ARLETT PEOPLES, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., APPELLEES

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

* * *

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Statement of Issues Presented

1. Whether the hunger and consequent injuries to health and survival suffered by appellants as a result of the Department of Agriculture's administration of the food stamp and commodity distribution programs is sufficiently direct and personal to give appellants constitutional standing to challenge the administration of these programs?

2. Whether the Department of Agriculture has unreviewable discretion to implement Congresional directives specifying the manner in which the Department is to alleviate hunger and malnutrition among poor persons in America?

3. Whether a District Court may, in a case where controlling evidence is in the exclusive possession of the Government, rely on facts found in an initial proceeding for preliminary relief where plaintiffs have been denied any and all discovery under the Federal Rules of Civil Procedure pending disposition of a motion to dismiss or, in the alternative, a motion for summary judgment?

4. Whether appellants have standing to challenge appellees' requirement, under the Food Stamp program, that households pay charges for food stamps in excess of their normal food

expenditures, where the Food Stamp Act mandates that prices for stamps be "equivalent" to a household's "normal expenditures for food"?

5. Whether appellants have standing to challenge appellees' practice of providing a greater allotment of stamps to families with more income but identical nutritional needs, where such practice contravenes the Food Stamp Act and constitutional requirements of equal protection?

6. Whether appellants have standing to challenge appellee Secretary's failure to determine that commodities should be distributed to needy persons, where the Food Stamp Act requires that such emergency powers be exercised in situations as are presently existent in the State of Alabama?

7. Do the appellants have standing to challenge whether the determination of the amount of food provided under the direct distribution program, without regard to whether recipients have a secondary and substantial source of food and without regard to the nutritional adequacy of food provided to persons who lack such a secondary and substantial source of food, violates the authorizing statutes of the Commodity Distribution program?

Previous Review By This Court

This case has been previously reviewed by this Court

on motions for summary reversal and affirmance of the District Court's denial of a preliminary injunction. The case was then, as it is now, styled Peoples v. Department of Agriculture, (No. 21,773). The case was heard by the Honorables Bastian, Burger, and Wright.

Statement of the Case

This action was brought in the United States District Court for the District of Columbia by appellants -- 32 individuals and 2 civic organizations, actively concerned with the problems of poverty in their communities, residing either in counties which operate a food stamp or commodity distribution program or no federal food program at all -- on behalf of themselves and others similarly situated for declaratory and injunctive relief against the United States Department of Agriculture, the Consumer and Marketing Service of the Department of Agriculture, the Secretary of the Department, and the Administrator of the Consumer and Marketing Service. The essence of the legal claims are that the appellees administer the Food Stamp and Commodity Distribution programs in a manner inconsistent with the statutory directives of the Food Stamp Act, 5 U.S.C. 2011 et seq., and the Commodity Distribution legislation, 7 U.S.C. 612(c), 1431, 1446a-1, and 1731, and in a manner which deprives appellants and others similarly situated of rights under the Fifth Amendment to the

United States Constitution.

Since the judgment under review herein is on a motion to dismiss, the factual allegations contained in the complaint should have been taken as true below and, of course, have to be taken as true on this appeal.

Specifically, the complaint alleged that appellees violate Section 7(b) of the Food Stamp Act, 7 U.S.C. 2016(b), by establishing purchase prices for food stamps at a level which exceeds a household's "normal expenditures for food." Appellants' Complaint, pp. 13-20. The complaint alleged that this practice has prevented appellants from receiving their federal food entitlements due to the fact that they have an insufficient amount of resources to pay the food stamp charge. Appellants' Complaint, pp. 15-16. The result of this, the complaint alleged, is that appellants, "their families and other persons similarly situated are in immediate, continuing and severe need of food to prevent further severe deterioration of their health by malnutrition, endangering their lives. . . ." Appellants' Complaint, p. 16.

Appellants further alleged that higher income families, similarly situated with respect to nutritional needs, receive more food stamps solely on the basis of their greater income. Since the amount of income is the only ground for providing differences in these food stamp allotments, appellants contended that such differences constitute arbitrary and discriminatory treatment,

violative of the Food Stamp Act and the Fifth Amendment to the United States Constitution. Appellants' Complaint, p. 20.

The complaint further alleged that a great amount of hunger and malnutrition exists in Alabama due to the chronic conditions of poverty in that state. This situation has been substantially aggravated by natural causes. Inter alia, the production of cotton from the 1967 crop was the smallest since 1895; many of the appellants and members of their class derive their income wholly or substantially from the production of cotton; weather temperatures during the months of November and December 1967 and January and February 1968 were unusually low; an epidemic of influenza inflicted incapacitating illness on many of the named appellants and members of their class. Despite these conditions, appellants alleged that the appellee Secretary refused to determine whether emergency situations resulted, therefore failing to provide commodity distribution assistance to appellants and other needy members of the class, in violation of Section 4(b) of the Food Stamp Act. 7 U.S.C. 2013(b). Appellants' Complaint, pp. 21-22.

Appellants also alleged that appellees determine the amount and kinds of food that are provided to needy persons eligible to receive commodities in the State of Alabama. They contended that this determination is made (a) without regard to whether such persons have another regular and substantial source of food and

(b) without regard to whether the food so provided to persons who lack such a secondary source is sufficient to enable them to maintain a diet consistent with the minimal nutritional standards established by the United States Department of Agriculture. The complaint said that this failure has perpetuated hunger, malnutrition, and ill-health among appellants and their class; that the determination is arbitrary, unreasonable, discriminatory, and in excess of statutory authority; and is thereby violative of the intent and language of 7 U.S.C. 612(c), 1431, and 1446a-1 as well as the Fifth Amendment to the United States Constitution.

Proceedings Below

A preliminary injunction motion was heard before Judge Hart on March 25, 1968. Judge Hart, relying on ex parte affidavits submitted by the government, without regard to the conflicting affidavits submitted by plaintiffs, made substantial findings of fact going to the Department of Agriculture's administration of both food programs and, accordingly, the merits of all of plaintiffs' claims. No evidence was heard at this proceeding. Based on these findings, he denied the injunction on several grounds, including that: the actions of the Secretary of Agriculture in administering the programs have not been arbitrary and capricious; plaintiffs' circumstances do not constitute an emergency situation

caused by a national or other disaster; and the Secretary has acted reasonably in construing legislative directives.

Appeals were taken to this Court and summary motions for reversal and affirmance were heard on the original record, without further briefs, before the Honorables Bastian, Burger and Wright. Plaintiffs' motion for summary reversal was denied on the ground that the briefs below and the inadequate factual record in the case at that point did not permit holding that there was clear error or abuse of discretion, particularly since certain jurisdictional claims had not been briefed at all. The Court also denied the government's motion for summary affirmance.*

Plaintiffs then sought discovery from the Department of Agriculture, which was stayed in its entirety on the government's motion to stay discovery pending determination of its motion to dismiss or, in the alternative, for summary judgment. The government's motions were heard before Judge Robinson on August 28, 1968, who entered an order granting the motion to dismiss.

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* Judge Wright dissented on the ground that the government's motion for summary affirmance should be granted so that the trial could "proceed with dispatch commensurate with the urgency of appellants' claims."

Judge Robinson adopted the factual findings of Judge Hart, in the earlier proceedings, and concluded on the legal issues that "in view of the Congressional policy and the local statutory scheme and objective, the statute creates in plaintiffs no rights enforceable by the Court. Therefore the Court lacks jurisdiction over the subject matter of this case."

Findings supporting this conclusion in the opinion were that neither the Food Stamp Act nor the Commodity Distribution program were designed to assure a nutritionally adequate diet qualitatively or quantitatively to people in Alabama or the rest of the country. Rather, Judge Robinson ruled, these Acts have as their primary purpose the removal of surplus stocks of commodities from the market. Any objective of providing food to needy persons was but incidental to this statutory purpose and hence the statutes vest in plaintiffs no legal rights to challenge the Department's administration of these programs.

It is this order -- dismissing the action on the ground that the Court lacks jurisdiction of the subject matter because plaintiffs are without standing in a Constitutional sense--which is under review in this Court. The merits of the particular claims below are before this Court insofar as they relate to both

Constitutional and discretionary questions of standing. The merits of the claims are briefed, however, since the questions of standing must be decided in regard to each claim.

ARGUMENT

I The District Court Erred in Holding That Appellants Had No Standing or Rights Enforceable to Maintain This Action.

The Court ruled that it was without subject matter jurisdiction over the action on the ground that plaintiffs had no standing. This, presumably, is a holding that plaintiffs are without standing in a constitutional sense, see Frothingham v. Mellon, 262 U.S. 447 (1923), going as it does to the jurisdiction of the Court. This holding is clearly erroneous since, as more fully set out hereafter, appellants are clearly injured in fact by the administrative practices they challenge and, hence, are aggrieved.

The Supreme Court last term once again set out the test for determining whether plaintiffs have standing in the constitutional sense. The Court reaffirmed its earlier statement that the "gist of the question of standing" is whether the party seeking relief has:

> "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult

constitutional questions." Flast v. Cohen, _____ U.S. _____, 88 S. Ct. 1942, 1953 (1968), quoting Baker v. Carr, 369 U.S. 186, 204 (1962).

The "personal stake" here -- receiving valuable food entitlements in order to overcome hunger and malnutrition, thereby preserving life itself -- is clearly sufficient within the intent of Flast and Baker. The District Court, therefore, apparently meant that the statutes create in plaintiffs no legal rights cognizable in a Court and for that reason plaintiffs have no standing. In urging the Court to so hold, the government relied on cases of economic competition created or allowed by federal programs, in which courts have held that the test for standing is whether the plaintiffs assert a legal right traditionally recognized by the law. See Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Pennsylvania Railroad Co. v. Dillon, 335 F. 2d 292 (D.C. Cir. 1964), cert. den. 379 U.S. 945. Even if one accepts the standard used, these economic competition cases are simply not applicable here; the cases invoking this doctrine typically involve attempts by competitors of the party regulated to complain of the treatment of the competing regulated party. Here, in contrast, we deal with persons who are themselves excluded from and otherwise deprived of their lawful entitlements under a government benefit program.

See King v. Smith, 392 U.S. 309 (1968).

More fundamentally, the proper standard is not whether one asserts established legal rights, but whether there is harm in fact to the plaintiffs and whether the statutes intend to protect or benefit the plaintiffs as a class. The former test look backwards, seeking a right traditionally or previously recognized by the law. The latter test looks to Congressional purpose, focusing on the intent of Congress to protect novel or hitherto unrecognized interests of impoverished or vulnerable groups. See Reich, The New Property, 73 Yale L.J. 733 (1964). In looking at Congressional intent, the latter test directs attention to the protective purposes of the legislation and to the merits of the claim, thereby affording one his day in court.* Both actual harm and intent to protect are well satisfied here.

A. Appellants are the persons who are harmed in fact by the practices they challenge and hence are aggrieved.

The conditions that the Food Stamp and Commodity Distribution programs are intended to alleviate are well documented by now. Appellants throughout the proceedings below proffered evidence on the conditions prevailing in Alabama and

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* This is not to say, however, that while protecting a class of plaintiffs, that Congress cannot preclude review, Harmon v. Brucker, 355 U.S. 579 (1968); rather, there must be a realistic examination of whether Congress has intended to preclude such review.

elsewhere, conditions described at length in the Report by the Citizens' Board of Inquiry into Hunger and Malnutrition in the United States. Transcript of Proceedings on Motion for Preliminary Injunction (hereinafter cited as Preliminary Injunction Transcript) (March 25, 1968), pp. 23, 35, 36, 81, and 83; Transcript of Proceedings on Motion to Dismiss (hereinafter cited as Motion to Dismiss Transcript) (Aug. 28, 1968), pp. 35 and 37. Indeed the government, seeking to avoid such proof, conceded that conditions of severe deprivation and malnutrition prevailed and Judge Hart agreed that such conditions exist. Preliminary Injunction Transcript (March 25, 1968), pp. 32, 33, 96, and 122. The transcripts are replete with asserted but unproven explanations by the government of why federal food programs have so abysmally failed to alleviate this severe malnutrition and its drastic consequences.

The Citizens' Board of Inquiry concluded

> "- that substantial numbers of new-born, who survive the hazards of birth and live through the first month, die between the second month and their second birthday from causes which can be traced directly and primarily to malnutrition.
>
> "- that protein deprivation between the ages of six months and a year and one-half cause permanent and irreversible brain damage to some young infants.

"- that nutritional anemia, stemming primarily from protein deficiency and iron deficiency, was commonly found in percentages ranging from 30 to 70 percent among children from poverty backgrounds.

"- that teachers report children who come to school without breakfast, who are too hungry to learn, and in such pain that they must be taken home or sent to the school nurse.

"- that mother after mother in region after region, reported that the cupboard was bare, sometimes at the beginning and throughout the month, sometimes only the last week of the month.

"- that doctors personally testified to seeing case after case of premature death, infant deaths, and vulnerability to secondary infection, all of which were attributable to or indicative of malnutrition.

"- that in some communities people band together to share the little food they have, living from hand to mouth.

"- that the aged living alone, subsist on liquid foods that provide inadequate sustenance." Hunger, U.S.A. - A Report by the Citizens' Board of Inquiry into Hunger and Malnutrition in the United States (1968) (hereinafter referred to as Hunger, U.S.A.), p. 9.

Appellants proffered evidence below that the region and state in which appellants live is more severely handicapped by the shackles of poverty than other areas in our country,*

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* Percentage of Families with Income Below $3,000

	Percentage
United States	21.4

(Cont'd)

and that the consequences are acute indeed. The dietary deficiencies and resultant physical harm to plaintiffs and the class they represent in Alabama has been significant. Testimony by Dr. Allen C. Mermann, of the Department of Pediatrics at the Yale University Medical School, before a Senate subcommittee, revealed the results of his Alabama survey: "80% of the (709) children tested had hemoglobin values of 9.4 grams or less. An expected normal would be 11.0 to 13.0 grams." Hearings before the Subcommittee on Employment, Manpower and Poverty of the Committee on Labor and Public Welfare, United States Senate, 90th Congress, First Session,Hunger and Malnutrition in America, July 11, 1967, pp. 53-56.** Other observations and reports

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* (Cont'd from p. 5)

Alabama	39.1
Arkansas	47.7
Florida	28.4
Georgia	35.6
Kentucky	38.1
Louisiana	35.6
Mississippi	51.6
North Carolina	37.1
South Carolina	39.5
Tennessee	38.3
Texas	28.7
Virginia	27.9

For Alabama Negroes, the percentage is 67.8. 1960 Census.

** Similar results have been found in Mississippi, the neighboring State of Alabama, with similar sociological, geographical

(Cont'd)

conducted in Alabama indicate that this severe poverty and malnutrition has taken disastrous tolls on the poor children of Alabama: a tremendous number of iron deficiency anemias - hypochromic, microcytic anemias - have been detected. See statement by Dr. H.F. Drake, physician from Huntsville, Alabama, in Hunger, U.S.A., p. 19; a high incidence of parasitic diseases associated with malnutrition - primarily ascaris infestation, pinworms, and amoebic dysentary - have been found in Alabama, Hunger, U.S.A., pp. 22-23; and severe and irreversable brain

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** (Cont'd from p. 6) and economic conditions. A dietary intake study in Mississippi Delta Counties, conducted by the Department of Agriculture concluded that the nutrient content of poor families was significantly below two-thirds of the National Research Council's recommended dietary allowance. Adelson, Sadye F., "The Dietary Situation Among Low-Income Households in Two Mississippi Delta Counties."

More specifically, the Child Development Group of Mississippi conducted two studies to determine the kinds of diets Headstart children are getting. The first study of families, most of whom received all or part of their food from the Commodity Distribution Program, found: 50 percent of the families had some meat three or less meals a week; 18 percent had meat only once a week and 18 percent had meat only once a week or not at all. "Survey of Family Meal Patterns," Child Development Group of Mississippi, Nutrition Services Division, May 17, 1967 and July 11, 1967 (two surveys).

damage, caused primarily by malnutrition, has resulted.*

Appellants - whether residents of counties with a Food Stamp or Commodity Distribution program - are representative of the people who daily suffer these consequences. They are poor, malnourished, and often in ill-health. They have large families and have little or no income.** For all of them

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* See generally, Testimony of Dr. Joseph Brenner, Medical Department of the Massachusetts Institute of Technology, at hearings before the Subcommittee on Employment, Manpower and Poverty of the Committee on Labor and Public Welfare, United States Senate, 90th Congress, Hunger and Malnutrition in America, July 11, 1967.

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Appellant's Name	Family Size	Average Monthly Income
Fred Calhoun	11	$60 or less
David Anderson	14	$100 or less
Lewis Hayward	7	$120 or less
Clara Stoudmire	8	$80 to $90
Mary Alice Taylor	7	$48 to $60
Mattie Lykes	9	$66
Tom Hardy	12	$180
Arlett Peoples	6	$240
James Henley	7	$60 or less
Cleocy Henley	9	$20 or less
John Armstead	6	None
Cora Lee Bentley	6	about $24
Sam Harris	5	$90
Daisy Dunn	2	$57
Angelenea Keith	6	$160
Annie Mae Rucker	11	$196
Luncy Word	2	$161.40
Elijah Green	4	None
Matilda Washington	7	$150
Luella Young	16	$188
Laura Louise Perkins	11	$75
Percy McShan	7	$200

(Cont'd)

the Food Stamp or Commodity Distribution program is potentially their primary or sole source of food.

The appellants' legal claims below are not merely that the appellees have failed to utilize their powers under the federal food programs to alleviate widespread hunger and malnutrition. Rather, as is set out more fully in the discussion of the merits of these claims, the aforementioned injuries and harms suffered by the appellants arise from particular and specified failures by the appellees to follow Congressional directives and mandates, as well as constitutional requirements, in administering these programs. The challenged administrative practices either totally exclude appellants from any participation

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** (Cont'd from p. 8)

Appellant's Name	Family Size	Average Monthly Income
Mary Powell	8	$154
Hattie Powell	9	About $42
Mary Henley	7	$80
Jane Henley	10	$111
Ruthie Lee Williams	6	$10 to $15
Lewis Bates	5	$10 to $20
Creed Brown	14	None
Dorothy Jean Ziegler	15	None
Jessie Mae Jackson	6	Negligible
Hoppie Edwards	7	None

in the program* or so to delimit their participation that they bear the severe and drastic consequences of hunger and malnutrition. Appellants are indeed harmed from the practices which the Court below ruled are insulated from judicial review.

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* As an example, appellants alleged that the appellees have set food stamp prices in excess of the statutory mandate - that the charge be "equivalent" to a household's "normal expenditures for food." 7 U.S.C. 2016(b). This unlawful practice has resulted in the exclusion of thousands of Alabama's poor people from their food entitlements. The United States Commission on Civil Rights has documented this fact. Their statistics show that this unlawful practice has been the primary cause of preventing a high percentage of Alabama public assistance recipients - the very people for whom the Food Stamp program was designed - from getting the food benefits. During the period October 1966 to September, 1967, the following percentage did not participate in the program:

Bullock County - 87.3%
Dallas County - 86.3%
Greene County - 91.6%
Hale County - 75.5%
Perry County - 64.7%

United States Commission on Civil Rights, Staff Report, Health, Welfare, and Food Programs in Alabama (1968), p. 7.

The government felt constrained to adduce explanations, but not evidence, of the very low participation in the Food Stamp program. Motion to Dismiss Transcript (Aug. 28, 1968), pp. 12-14, 23-26.

B. Appellants are the persons the Food Stamp and Commodity Distribution legislation were designed to protect.

The Court below ruled that both the Food Stamp and Commodity Distribution programs are concerned primarily with distributing surplus commodities and thereby improving the nation's agricultural economy by the removal of surplus stocks. In other words, the Court ruled that these programs are concerned with the agricultural economy, in the manner of price supports for farmers, and not with hunger and malnutrition as such. The statutes on their face and in operation belie the assertion that they are intended to help farmers by distributing commodities. 7 U.S.C. 2011-2025; 7 U.S.C. 612(c).

The Food Stamp program does not distribute surplus at all, but any foods people choose in order that they have "an opportunity more nearly to obtain a low-cost nutritionally adequate diet." 7 U.S.C. 2016(a). Nowhere, in Section 32 (7 U.S.C. 612c), does the legislation talk of using "surplus commodities" in the Commodity Distribution program: it too is intended to provide food to needy persons. Of course, the agricultural economy is improved and assisted by the increased distribution of food to any persons, but that is only to say that the economic objectives of these programs are incidental

to the welfare objectives. The Court below erred in reversing these obvious priorities.

The dominant welfare purposes of the Food Stamp program have been clearly set out by appellee Secretary Orville L. Freeman. Testifying before a Senate subcommittee on the origin of the Food Stamp program, the Secretary stated:

> After three years of operation on a pilot basis, President Johnson recommended and the Congress passed the Food Stamp Act in 1964. The purpose was, and is, to help low-income families supplement their food dollars with enough additional food purchasing power to obtain a better diet.
>
> Hearings before the Subcommittee on Employment, Manpower, and Poverty of the Committee on Labor and Public Welfare, United States Senate, 90th Congress, First Session, on Hunger and Malnutrition in America. July 12, 1967, p. 121. (Emphasis added.)

The Act leaves no doubt of its purpose. The Act's Declaration of Policy provides:

> It is hereby declared to be the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, and local governmental units to the maximum extent practicable to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households . . . . To effectuate the policy of Congress and the purposes of this Act, a food stamp program, which will permit those households with low income to receive a greater share of the Nation's food abundance, is herein authorized.
> 7 U.S.C. 2011

Many other provisions in the Act show that poor people were the intended beneficiaries of the program:

> The Secretary is authorized to formulate and administer a food stamp program under which, at the request of an appropriate State agency, eligible households within the State shall have a greater monetary value than their normal expenditures for food . . . . 7 U.S.C. 2013(a).
>
> Participation in the food stamp program shall be limited to those households whose income is determined to be a substantial limiting factor in the attainment of a nutritionally adequate diet.
> 7 U.S.C. 2014(a).
>
> The face value of the coupon allotment which State agencies will be authorized to issue to households certified as eligible to participate in the food stamp program shall be in such amount as will provide such households with an opportunity more nearly to obtain a low-cost nutritionally adequate diet.
> 7 U.S.C. 2016(a).

Moreover, the Act is patterned after the public assistance sections of the Social Security Act - which is assuredly a welfare program - and contains many of its safeguards protecting needy beneficiaries. See 7 U.S.C. 2016(c), 2019(d), and 2019(e). See also 42 U.S.C. 302(a)(6); 42 U.S.C. 602(a)(8); 42 U.S.C. 1202 (a)(9); and 42 U.S.C. 1352(a)(9). The short of it is that Congress enacted the Food Stamp program in order to advance the interests of low-income households. The provisions of the

Food Stamp Act clearly dispel the District Court's notion that feeding the poor was only incidental to the Act's primary objectives. The legislative history corroborates this plain reading of the statute. The House Report on the Act states:

> The whole theory of the food stamp program is that of expanding the ability of low-income households to purchase food. The stamps are purchased by the participants with the money they would ordinarily spend for food . . . . House Report No. 1228, 88th Congress, Second Session (1964), p. 14.

Elaborating on the purposes of the program -- to more nearly provide indigents with a low-cost nutritionally adequate diet - the Senate Report indicated the program's intended objectives:

> The term "low cost" nutritionally adequate diet is intended to convey the idea of a food plan which includes a sufficient variety of foods needed to meet recommended dietary allowances of the National Research Council, to satisfy appetites, and to meet energy needs. Senate Report 1124, 8gth Congress, Second Session (1964), p. 3286.

Statements made on the floor of the House confirm these welfare objectives. The Chairman of the House Agriculture Committee, Representative Cooley, stated: "This program is for poor people, for hungry people." 110 Cong. Rec. 7281 (1964). Other Congressmen made near-identical statements. See also,

110 Cong. Rec. 7130 (1964) (Statement of Congressman Latta); 110 Cong. Rec. 7156 (1964) (Statement of Congressman Ryan).

Finally, the Committee hearings on the bill are very revealing as to appellee Secretary's views on the purposes of a food stamp program. The Secretary testified:

> The specific purpose of a stamp program is to increase the food-buying ability of families whose limited incomes do not permit them to buy all the food they need for minimum good nutrition. In doing this, we utilize the existing commercial distribution system.
> Hearings before the Committee on Agriculture and Forestry, United States Senate, 88th Congress, Second Session, on H.R. 10222, June 13 and 14, 1964, p. 11.

Although the Commodity Distribution legislation is short in language, it is clear in purpose. Created in 1935, in the midst of our nation's greatest depression, it is clear why Congress was seriously concerned with measures to food impoverished people. The two legislative components of the program - Section 32 (7 U.S.C. 612c) and Section 416 (7 U.S.C. 1431) - show the intent of the Congress to feed hungry people. Section 32 speaks in terms of providing commodities for "persons in low-income groups"; section 416 directs that the commodities be used "in the assistance of needy persons." Senate and House Reports both stated that the commodities program would "build up the

low consuming areas within our own population to a level adequate for the maintenance of health . . ." House Rep. No. 1241, 74th Congress, First Session (1935), p. 6; Senate Rep. No. 1011, 74th Congress, First Session (1935), p. 4.

During the House debates of a 1939 amendment to the Section 32 legislation - which provided greater assurance that the interests of poor people would be furthered through the distribution of commodities, 53 Stat. 975, 76th Congress, First Session - Representative Crawford of Michigan clearly enunciated the welfare-feeding purposes of the program. Quoting remarks made by the Secretary of Agriculture, he commented about the envisioned significance of the commodities program:

> "If this plan is fully successful, it means that the day is not far distant when all of the people of the United States will be adequately nourished. . . ." 84 Cong. Rec. 3230 (1939)

Again, the debates on the floor of both houses convey the important objective of assuring better nutrition for our nation's poor. See, e.g., 84 Cong. Rec. 3231 (1939) (House); 84 Cong. Rec. 5208 (1939) (Senate).

In sum, the legislation, Senate and House reports, debates on the floor of both houses, testimony in committees, and speeches by the Agriculture Secretary make abundantly clear

that the District Court erred when it held that the welfare benefits intended under the Food Stamp and Commodity Distribution programs were only incidental to other purposes. The intent of Congress in formulating these programs was to assure that hunger in America would be alleviated. The Community Distribution program was to do this by direct handouts of food to needy persons; the Food Stamp program was to accomplish this by issuing food stamps valued far in excess of the price paid to purchase them (thereby providing increased food purchasing power to needy people). That the goals of the programs have been frustrated is indicative of the seriousness of appellants' claims and appellees' unlawful practices; they are no reflection of Congressional intent.

C. Plaintiffs have standing to require judicial review of unlawful administrative practices, where the violated legislation is intended for plaintiffs' benefit.

The principle that plaintiffs should be granted standing because they are the persons whose rights and interests were to be protected has long been recognized. As early as The Chicago Junction Case, 264 U.S. 258 (1924), the Supreme Court made it clear that standing would be granted to those

asserting an interest intended to be protected by statute. In that case, competing railroads were permitted to challenge an I.C.C. order to New York Central because they were the parties whom the questioned statute was designed to protect. See 1 Jaffe, Judicial Control of Administrative Action 507-508 (1965).

Several recent cases have reaffirmed this principle. In Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, (W.D. La. 1965), aff'd. 370 F. 2d 847 (5th Cir. 1967), Negro school children were given standing to enforce Title VI of the 1964 Civil Rights Act, 42 U.S.C.A. §200d (Supp. 1966) (prohibition of discrimination in federally aided programs) because they were the persons whom the Act was intended to protect. In Gart v. Cole, 263 F. 2d 244, 250 (2d Cir.) cert. denied, 359 U.S. 978 (1959), residents of an urban renewal site were granted standing to challenge a failure to hold the statutorily required public hearing on the ground that the requirement was inserted for their protection. In Shanks Village Committee v. Cary, 197 F. 2d 212 (2d Cir. 1952), tenants in public housing were held to have standing to seek review of rent levels since statutory guidelines for such rentals were intended to protect them. See Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 126-128 (1967). Cf., J.I. Case Co. v. Borak, 377 U.S. 426 (1964). And the Court of Appeals for this District has

found that television viewers have standing to challenge F.C.C. licensing determinations before the Court of Appeals. The Court noted that television viewers have a substantial investment and interest in the television media. Office of Communication of United Church of Christ v. F.C.C., 359 F. 2d 994, 1002-1003 (D.C. Cir. 1966).

Directly on point is the Second Circuit's extended discussion of standing in a markedly analogous case, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920 (2d Cir., 1968). Plaintiffs were Negro and Puerto Rican persons currently or formerly residing in an urban renewal area who claimed: (1) that adequate relocation housing was not being provided as required by statute, and (2) that they, as non-whites, were denied equal protection in the provision of relocation housing. The Court upheld standing on both the constitutional and statutory claims.*

The statutory claim was based on legislation that stated that the contract between the federal agency and the local redevelopment agency must provide adequate safeguards for the

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* On the constitutional issue, the Court concluded that the complaint stated an equal protection claim that should be heard by the Courts because plaintiffs were members of the group directly and adversely affected by the state action alleged to be discriminatory.

displaced families. Decent, safe and sanitary dwellings had to be provided; relocation housing had to be reasonably accessible to places of employment; public utility service had to be reasonably available; and other protections had to be provided for the displacees. Determining whether the displaced-plaintiffs had standing to challenge the defendant-agencies' violation of these safeguards, the Circuit Court stated:

> The plaintiffs' statutory claim is that the federal and local defendants have violated section 105(c) of the Act, 42 U.S.C. 1455(c) (Supp. 1967). The District Court concluded that the plaintiffs lacked standing to raise this issue. Since the section requires provisions for the relocation of displaced families, it can hardly be thought that displaced families such as plaintiffs, do not have the required personal stake in the outcome of litigation where a violation of the section is claimed. If anybody can raise this claim, it is these plaintiffs.
> 395 F. 2d 920, 932 (2d Cir. 1968)

Recently, this Circuit has indicated its approval of the Second Circuit's approach to the standing question. The Court held that the National Maritime Union has standing to bring suit for enforcement of a federal statute requiring use of "all available" United States ships to transport military cargo before any foreign vessels are used, with executive power to break out "mothballed" fleet so that they are taken into account in the determination of "availability". The Court said:

> Though there can be no doubt that the primary aim of the bill was to assure a "splendid" American merchant fleet in wartime, other purposes, including increased employment of United States seamen, were also intended to be served by it. Even if this benefit to United States seamen was but one of several purposes, and even if this purpose was not likely to be successfully served by the Act, that Congress intended such a result is all that is required to establish standing even under the restrictive requirement of legal right. So long as "an interest intended by the statute to be protected has been denied that protection" standing should be maintained. Curran v. Clifford, 37 LW 2390 (D.C. Cir., December 27, 1968).

The United States Supreme Court has approved the above views on standing shared by the Court of Appeals for this and the Second Circuit. In Hardin v. Kentucky Utilities Company, 390 U.S. 1 (1968), the Court explicitly conferred standing upon a private company to assert competitive injury where the intent of Congress was to protect the private utilities from such competition. (Plaintiffs in that case challenged the T.V.A.'s alleged service expansion, to an area previously served by the plaintiffs, in violation of a congressional enactment barring the T.V.A. from moving into areas for which it had not been the primary source of power.) The Court stated:

> (I)t has been the rule at least since the Chicago Junction Case, 264 U.S. 258 (1924), that when the particular statutory provision does reflect a legislative purpose to protect a competitive interest, the injured competitor

has standing to require compliance with the provision. See Alton R. Co. V. United States, 313 U.S. 15, 19 (1942); City of Chicago v. Atchison T. & S.F.R. Co., 357 U.S. 77, 83 (1958).
390 U.S. 1, 6 (1968).

Appellants' position is even stronger. In the case at bar, the interest of the appellants is not merely one of competitive advantage or simple economic injury; their interest is far more fundamental. It is the interest of receiving entitlements which provide/needed to sustain spirits, health, and life. The unlawful practices alleged by the appellants substantially affects their struggle for survival; they, also, frustrate the attempts by Congress to provide appellants with adequate nourishment.*

D. Denial of standing effectively forecloses judicial review of appellees' unlawful practices.

To deny standing to appellants and their class - those protected by the statute and vitally affected by its administration - is to deny reviewability of appellees' unlawful practices. No other type of plaintiff exists who can assert appellants' claims. Surely appellees cannot be relied upon to challenge their own lawless acts. Nor can local or state governments, acting in concert with appellees, effectively represent appellants' interests.

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* See footnote on page 10.

Only those who are themselves deprived of sustenance by appellees' acts are proper custodians of the legal claims which appellants pray will bring them their lawful entitlements. The short of it is that a denial of standing would place appellees' lawless practices beyond all scrutiny.

Concern that needlessly restrictive notions of standing should not preclude judicial scrutiny runs throughout the relevant precedents. See, e.g.: Abington School Dist. v. Schempp, 374 U.S. at 266, n. 30 (1963) (Brennan concurring); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n. 6 (1963); Flast v. Cohen, F. Supp. (S.D.N.Y. 1967) (Frankel dissenting), reversed _____ U.S. _____, 88 S. Ct. 1942 (1968). In Curran v. Clifford, supra, this Circuit demonstrated similar concern towards the unreviewability of unlawful practices. Holding that the National Maritime Union had standing to make sure that the statute - assuring that all United States ships would be used before foreign vessels are employed - the Court said:

> (T)hey are perhaps the only party with sufficient interest to challenge the Defense Department's allegedly unlawful administrative practice and thereby vindicate the public interest in an adequate wartime merchant fleet.
> 37 LW 2390 (D.C. Cir., Dec. 27, 1968).

Appellees' attempt to insulate themselves from judicial review is but the most recent episode in a continuing, but largely unsuccessful attempt to avoid judicial review. In a case raising issues similar to the statutory claims of plaintiffs herein, farmers and producers of flue-cured tobacco challenged a reduction in acreage allotments. The Fifth Circuit overcame all jurisdictional obstacles and ordered the Secretary to recompute the allotments. Freeman v. Brown, 342 F. 2d 205 (5th Cir. 1965). Similarly, the Court of Appeals for this Circuit has ruled that despite an absence of statutory provision, a person who contracts with the Department of Agriculture has "standing to challenge the debarment process" by which his right to contract was suspended. Gonzalez v. Freeman, 334 F. 2d 570, 575 (D.C. Cir. 1964). Appellants' interest in the elements of survival is surely entitled to similar judicial consideration.

E. The actions of the Secretary, challenged herein, are not committed to his unreviewable discretion.

The Court's holding below also entails a finding that the Commodity Distribution program and the Food Stamp program vest exclusive and unreviewable discretion in the Department of Agriculture. Indeed, this was urged upon the Court in the government's brief below although the government conceded in

oral argument that discretion was unreviewable because it had been reasonably exercised.* Motion to Dismiss Transcript (Aug. 28, 1968), pp. 8-9, 13.

It would certainly be anomalous to suggest that the Secretary's administration of the federal food programs is unreviewable. This is particularly true in light of the fact that the unlawful administration of very similar welfare programs - distributing money, medical services and the like - have never given rise to the question of unreviewable discretion. The actions of welfare administrators have always been reviewable when such actions were contrary to statute or violative of the Constitution. Plaintiffs, in numerous welfare cases, have had standing to review decisions and practices of welfare administrators that allegedly violated provisions of the Social Security Act and the Constitution. See, e.g., King v. Smith, 392 U.S. 309 (1968); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), argued, 36 U.S.L.W. 3425 (U.S. May 7, 1968), reargued, 37 U.S.L.W. 3157 (U.S. Oct. 29, 1968); Ramos v. Health and Social Services Board, 276 F. Supp. 474 (D. Wis., 1967); Anderson v. Schaefer, Civ. No. 10443 (N.D. Ga., April 5, 1968).

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* The government also conceded in oral argument that its claim on plaintiffs' lack of standing was inseparable from its position on the merits that the Secretary had fully complied with congressional and constitutional mandates. Motion to Dismiss Transcript (Aug. 28, 1968), pp. 95-98. Despite this concession, the Court decided to dispose of the case on grounds of standing and reviewability.

In a recent decision, almost on all fours with the issues here presented, the Federal District Court for the Northern District of California issued a temporary restraining order directed against the apppellees in this case. Hernandez v. Freeman, Civ. Action No. 50333 (N.D. Calif., Dec. 30, 1968). In that action, plaintiffs - poor and hungry people, similar to the appellants herein - brought suit to declare the operation of the Food Stamp and Commodity Distribution programs out of conformance with the statutory intent and the Constitution to the degree that said programs, as operated in California, exclude needy and hungry beneficiaries from their benefits solely on the basis of county of residence. The Court, by providing the preliminary relief requested by plaintiffs, of course ruled that defendants' unlawful administration of the two food programs are not committed to their unreviewable discretion.

The fact that the statutes are silent, on the issue of judicial review, is not a bar to allowing appellants their day in court on the merits of their claims. Statutory silence does not imply preclusion from judicial review; administrative law is quite to the contrary. As Professor Kenneth Culp Davis sums it up:

> "The most important proposition about the law of unreviewability remains: The presumption of reviewability controls unless it is rebutted by affirmative indication of legislative intent in favor of unreviewability, or some special reason for unreviewability growing out of the subject matter or the circumstances."
> 4 Davis, Administrative Law §28.21 (Supp. 1965)

The Supreme Court has set forth its view of reviewability in Harmon v. Brucker, 355 U.S. 579 (1958), a case involving the propriety of a "general" rather than an "honorable" discharge. The relevant statutes provided that the findings of the military board were to be "final subject to review by the Secretary" and "final and conclusive on all officers of the Government except when procured by fraud." 355 U.S. at 584-585. Nonetheless the majority stated:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108; Philadelphia Co. v. Stinson, 223 U.S. 605, 621-622; Stark v. Wickard, 321 U.S. 288, 310. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercise of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."
> 355 U.S. at 581.

Judicial review of the Secretary's unlawful practices are mandated by the Administrative Procedure Act. Section 10 of the Act provides that:

> any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
> 5 U.S.C. 702. See also B. Davis, Administrative Law, Section 22.02 (1958).

Therefore, unless Congress clearly enunciated an intent to preclude appellants from reviewing the unlawful decisions and practices of the appellees, it is clear that the Court below erred in denying judicial review. As explained by the Supreme Court:

> A survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress. [citing cases] . . . . [O]nly upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.
> Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)

Appellants do not deny, here, that the appellees may exercise discretion in their administration of the food programs; the claim is that they have acted far in excess of their discretion in violation of statutory and constitutional directives. Review is compelled when permanent physiological and psychological

harm is being done - to appellants and the thousands of members of the classes they represent - by actions of the appellees violative of such requirement.

II Relying Upon Extensive Findings of Fact from Ex Parte Affidavits, Submitted by the Government in an Initial Preliminary Injunction Proceeding, to Resolve Disputed Issues of Fact in Granting the Government's Motion to Dismiss or for a Summary Judgment, Where the Opposing Party is Denied an Opportunity to Examine the Affiants, is a Violation of the Federal Rules of Civil Procedure and a Denial of Due Process of Law.

In granting the government's motion to dismiss or, in the alternative, for a summary judgment, Judge Robinson did not in his Opinion or Order designate which motion he was granting. He did, however, deem it necessary to make findings of fact and hence provided at the outset of his Opinion that "the Court hereby finds the facts . . . as follows:

"Findings of Fact"

"The Court incorporates by reference and adopts as its own the findings of facts made and signed by United States District Judge George L. Hart, Jr., on March 26, 1968."

This confusion is not dissipated by looking at the Opinion of Judge Hart entered early in the case on the Plaintiffs' Motion for a Preliminary Injunction on March 26, 1968, since that opinion makes very extensive, albeit preliminary, findings of fact. These findings, though based on but several ex parte affidavits of appellee Secretary Orville Freeman and appellee Administrator of the

Consumer and Marketing Service, are not on procedural questions of standing and jurisdiction. Rather they go to the merits of the government's defense on each and every one of the Plaintiffs' substantive legal claims and amount to a denial of relevent facts underlying the claims. Thus, Judge Hart found, inter alia, that the Department engages in continuous, extensive and reliable efforts to ascertain the normal expenditures for food of low income households; that the schedules based on these studies reflect normal expenditures or something less than normal expenditures; that appropriation limitations which Congress has established for the fiscal years 1968 and 1969 will not allow any increase in the value of food stamps issued under the Act; that commodities in surplus supply were fully distributed in the Commodity Distribution Program; that emergency conditions did not exist, and so on. Civil Action No. 544-68 (March 26, 1968), pp. 3-6, 7a. Predicated on these preliminary findings, Judge Hart concluded that the likelihood of the Plaintiffs prevailing on the merits on final hearing is slight.

Following the summary appeal, in which this Court referred to the inadequacy of the record in denying the motion for summary reversal, Plaintiffs sought discovery against the makers of these affidavits and others in the Department of Agriculture with evidence going to the disputed factual issues in the case. Interrogatories and subpoenas duces tecum were served and depositions

were noticed. On July 1, 1968, the government sought and obtained over opposition an extraordinary protective order totally staying all discovery pending the hearing on the motions for summary judgment and to dismiss. Although such an order is not sanctioned by the Rules and cases thereunder, Skorus Theatre Corp. v. Radio-Keith-Orpheum Corp., 10 Fed. Rules Serv. 2d 306.31, Case 1 (SDNY 1966); Indian Lake Estates Inc. v. Lichtman, 27 F.R.D. 417 (D.C.D.C. 1961) it was granted on the government's representations that there are no issues of fact in the case and that the motions would be heard within a month by Judge Hart, who was familiar with the case. Neither of these representations was borne out by subsequent events.

In opposing the summary judgment motion, Plaintiffs specified the issues on which there was a genuine dispute pursuant to Local Rule 9(h), which included those issues on which plaintiffs had no opportunity to discover and prove. This, of course, embraced the matters in Judge Hart's opinion of March 26.

It is plain that findings of fact based on the ex parte affidavits of a party used to deny a motion for preliminary relief cannot be conclusively relied upon to resolve disputed issues of fact and thereupon to grant a motion for summary judgment, which finally disposes of the case. Findings in a preliminary injunction proceeding are preliminary and tentative, being entered prior to

discovery and development of the real points of dispute. Cone v. Rorick, 112 F.2d 894 (5th Cir. 1940). Accordingly they cannot form the predicate for final disposition of a case, particularly where the party opposing summary judgment is denied any opportunity to examine matters asserted in ex parte affidavits and the facts are exclusively or largely under the control of the moving party. Slagle v. United States, 228 F.2d 673 (5th Cir. 1956); Tobelman v. Missouri Kansas Pipe Line Co., 130 F.2d 1016 (3rd Cir. 1942). Discovery must be had before disposing of the motion for summary judgment, Waldron v. British Petroleum Co., 231 F. Supp. 72, 94 (S.D.N.Y. 1964); Morrison Flying Service v. Demming Nat'l Bank, 340 F. 2d 430 (10th Cir. 1965); Pittsburgh Hotels Ass'n. v. Urban Redevelopment Authority, 29 FRD 512 (W.D. Pa. 1962). Rule 56(f), expressly provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

See Dombrovski v. Esperdy, 185 F. Supp. 478 (S.D.N.Y. 1960) aff'd 321 F.2d 463 (2d Cir. 1963).

Developments since the findings of Judge Hart tellingly demonstrate the need for discovery in this case and the unreliability of the factual findings relied on below. Since last March the Department has subsequently altered both the previous schedules of prices of food stamps and the amounts of bonus the stamps afford. Judge Hart ruled that neither of these could or should be done under appropriations limitations for 1968 and 1969 and under existing studies of normal expenditures for food. Our point, however, is not only the incorrectness of the findings, but the manner in which Judge Robinson found the facts for final disposition. Plaintiffs may not be denied an opportunity to prove a case on the basis of ex parte affidavits submitted in a preliminary proceeding, even where these are of government administrators.

Certainly these affidavits, and findings thereon, may not be used to grant summary judgment where, as here, the record contains substantial evidence in conflict with the findings. See Motion to Dismiss Transcript, Pp. 37, 40, 44-47, 68-71. Whether the decision below be on technical notions of standing or a view of standing inseparable from the merits, it is vitiated by the manner in which Judge Robinson found the facts so crucially bearing on the merits of the claims.

III Appellants' Claims are Substantial and the Court Below Erred When It Denied Appellants Judicial Review of Appellees Alleged Unlawful Practices.

The Court below held that the appellants have no rights enforceable in Federal District Court. Necessarily involved in this determination is the question of whether the claims presented are substantial and whether there appears to be a likelihood that these claims will merit an eventual finding in appellants' favor. As set out below, the claims of the appellants are not only substantial, but they have been the source of drastic injury to the appellants herein. The claims presented do not deal with minor disagreements between the appellants and appellees but reflect allegations that the appellants are aggrieved by practices which have violated the Constitution and abrogated statutory directives, thereby frustrating Congressional purpose. A summary of these claims are set out below in order to demonstrate the substantial importance and merit involved.

A. Appellants have standing to challenge appellees' requirement that persons pay charges for food stamps determined without regard to the actual normal expenditures for food and in excess of the actual amount of such expenditures.

When Congress enacted the Food Stamp Act in 1964, it intended that much-needed food benefits would be readily available to

our nation's poor. As enacted by the Congress, opportunity for an eligible person to participate was to be assured by conforming the recipient's expenditure for the stamps to the amount he normally expends on food; the Act unequivocally makes the amount that a family spends on food the measure of how much it need pay for stamps:

> Households shall be charged such portion of the face value of the coupon allotment issued to them as is determined to be the equivalent to their normal expenditures for food. §7(b) Act, 7 USC 2016(b). (emphasis added)

The amount charged for stamps is plainly the key to the operation of the Food Stamp program, for the ability of the needy, particularly the very needy, to feed themselves and their families depends on a meaningful relationship between prices charged for stamps and their actual expenditures for food. The poor are not blessed with the luxury of reserves of money to expend more than such actual expenditures for food.

Contrary to the clear Congressional intention to provide greater and more adequate food benefits [§2 Act, 7 USC §2011], the Department of Agriculture has devised a food stamp payment schedule which has greatly restricted the possibility for participation. Born out of administrative expediency, in direct violation of the statutory mandate that persons be charged "their normal expenditures for food" [§7(b) Act, 7 USC §2016(b), supra], the payment schedule

has frustrated Congressional purposes insofar as it results in excessive charges for the stamps. Although participation in the program is clearly advantageous to the poor, a majority of the intended beneficiaries have not participated; potential recipients have been unable to purchase the stamps because the prices have been excessive of their normal food expenditures. See footnote, herein, page 10.

In Alabama, as in the other nine states using the identical payment schedule, the effect of the Department's non-compliance with the statute has been drastic. This is clearly evidenced by the large reduction in food program recipients when a county switches from Commodity Distribution to the Food Stamp program. Although the eligibility requirements for both programs are identical, when Dallas County, Alabama, shifted from commodities to food stamps in the 1966-67 fiscal year, participation dropped from 11,493 to 5,237 individuals, a decline of more than 50 percent. Similarly in Greene County, Alabama, the same shift in the same year reduced participation from 6,666 to 3,635. In each instance, the cost of the stamps was the main reason for non-participation.*

* In Mississippi--a state with analgous economic and geographical circumstances and one of the nine other states that operates a Food Stamp program with the identical price schedule as Alabama--the effect has been at least as drastic. In eight Mississippi

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United States Commission on Civil Rights, Staff Report, Health, Welfare, and Food Programs in Alabama (1968), pp. 6-7.

That the provisions of Section 7(b) of the Act--mandating that low-income households are to be charged food stamp prices "equivalent to their normal expenditures for food"--have been violated is reflected by the price tables themselves and the manner in which they were set. The payment schedules are based on two factors alone: size of household and income. Using only these two variables, the Department has prescribed one inflexible schedule alike not only for rural and urban Alabama, but for nine other states as well. Without taking into account the economic variables of rural versus urban living, the different levels of food prices from one state to another, problems of debt, and other

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* (Cont'd from p. 37)

counties that have changed from commodity distribution to food stamps, there was a total decrease in participation (one year after the changes) of almost 36,000 recipients. In Jones County, participation dropped from more than 17,500 in March 1965 (with commodities) to less than 4,700 in March 1966 (with food stamps)--a decrease of almost 13,000 participants. In Harrison County, participation dropped from almost 9,600 (with commodities) in March 1965, to less than 2,200 (with food stamps) in March 1966--a decrease of almost 7,000. In Coahoma County, the decrease was almost 6,700 from October 1965 (with commodities) to October 1966 (with food stamps). In Forrest County, the decrease was more than 3,500 from October 1965 (with commodities) to October 1966 (with food stamps).
Transcript of Proceedings Mississippi State Advisory Committee to the United States Commission on Civil Rights 330-331. (Hearings in Jackson, Mississippi, on February 17 and 18, 1967.)

important considerations which provide the necessary basis for computing a household's "normal expenditures for food," the Department established identical food stamp schedules for ten disparate Southeastern states. See Hunger, U.S.A., supra, p. 58.

Based on needless expedience rather than faithfulness to the Act, the Department rigidly dictated that food stamp applicants and recipients must always pay the same amount for the stamps whether they live in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee or Virginia;* no opportunity to contest this arbitrary determination has been provided to such an applicant or recipient.** Equally

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* The Department's arbitrary actions in this regard have not been confined to the Southeastern states, however. Excluding seven other states which have no Food Stamp program--Arizona, Delaware, Florida, Idaho, Nevada, New Hampshire, and Oklahoma--the stamp recipients in the other 33 states, on the basis of size of household and income alone, have been conclusively determined to have the exact same "normal expenditures for food." No possibility to refute this determination is afforded to any applicant or recipient in those states as well.

** The variety of circumstances in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia is evidenced by these states' welfare department determinations, which have calculated the monetary need for food, for a household of four at the following respective figures for each state: $78.10, $95.00, $111.00, $96.00, $74,50, $84.10, $62.00, $75.00, $106.00, and $84.00. Alabama--Manual for Administration of Public Assistance, Part I, Table 2; Arkansas--Manual of the State Department of Public Welfare, Secs. 2320, 2220, 2322, 2322.4, and 2360.1; Georgia--Manual of Public Welfare Administration, Part III, Section VII;

(Cont'd)

rigid is the Department's universally applied policy that a food stamp applicant or recipient must pay exactly what the tables require, never less nor more; if an individual has lower "normal expenditures for food," has no income, or cannot afford the schedule prices, he is entirely excluded from the benefits of the program.

The appellants--rural poor people in Alabama--are therefore being deprived of their statutory entitlements because of the Department's arbitrary assumptions about their normal food expenditures. This has resulted from the Department's determination that poor persons in Arlington, Atlanta, Louisville, Memphis, New Orleans, and Richmond must always pay the same amount for food stamps as individuals in Brent, Demopolis, Greensboro, Hayneville, Linden, and Selma, Alabama. The short of it is that the schedules of stamp prices set up by the Department do not reflect the differences between the amounts spent for food in urban and rural

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** (Cont'd from p. 39)

Kentucky--Public Assistance Manual of Operation--Table II A-AFDC; Louisiana--Manual of Policies and Procedures--Department of Public Welfare, Sec. 2-922; Mississippi--Manual of Policies and Procedures for Administration of Public Assistance, Vol. III, Sec. E, p. 5210; North Carolina--Public Assistance Manual of Policies and Procedures, Chap. III, Sec. 310; South Carolina--Manual of Policies and Procedures in Public Assistance, Table 1; Tennessee--Public Welfare Manual, Vol. II, Table i; Virginia--Public Assistance Manual, Appendix to Sec. 210.2. It is also notable that the Department of Agriculture has not considered--in its determination of the price of stamps--the amount each state provides in welfare payments for the expenditure of food.

areas and thus penalize the rural poor by conclusively presuming that their food expenditures are the same as their urban counterparts. The thousands of people--represented by the appellants herein--who have been unable to purchase the stamps, because of the arbitrary and rigid tables set by the Department, are eloquent testimony to appellees' violation of the statute and its frustration of Congressional purpose.

The law has consistently recognized that administrative expediency is an inadequate substitute for obeying the statutory commands of the Congress; interpretations of statute must not frustrate the will of the legislature. United States v. Missouri Pac. R. Co., 278 U.S. 269, 277-78 (1928); Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936); Addison v. Holly Hill Co., 322 U.S. 607, 617 (1944); Dixon v. United States, 381 U.S. 68, 74 (1965); McCeney v. District of Columbia, 230 F.2d 832, 835 (D.C. Cir. 1956); Northern Natural Gas Co. v. O'Malley, 277 F.2d 128, 131 (8th Cir. 1960); Federal Maritime Commission v. Anglo-Canadian Shipping Co., Ltd., 355 F.2d 255, 258 (9th Cir. 1964); Texaco, Inc. v. Federal Power Commission, 317 F.2d 796, 806 (10th Cir. 1963); Greyhound Corp. v. United States, 221 F. Supp. 440, 444 (N.D. Ill. 1963). The applicable rule was stated by the Supreme Court in the Manhattan General

Equipment Co. case, supra:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.
> 297 U.S., at pages 134 and 135.

Although the Department believes that the uniform schedules are helpful for simple administration of the Food Stamp program, the frustration of the Act's basic policy--providing much-needed food assistance to the poor, hungry and malnourished--and the violation of Section 7(b) of the Act is too high a price to pay for such expediency. As stated in Addison v. Holly Hill Co., supra: "The natural meaning of words cannot be displaced by reference to difficulties in administration." 322 U.S., at 617. Moreover, such deviation from the statute is unnecessary; actual expenditures reflecting locale and other individualizing factors would not impose burdens on local administration of the program.

Exceptions to these time-honored principles may not be entertained because of the public assistance character of the Food Stamp Act. This point is made abundantly clear in King v. Smith, 392 U.S. 302 (1968), where the Court, after finding that Alabama's "man-in-the-house" rule violated the Social Security Act, ruled

that federal administrative approval of Alabama's regulation would have been irrelevant. The federal statute controls. Surely the Department of Agriculture owes no less a duty of adherence to the Food Stamp Act.

Appellants pray that they be given an opportunity to show that their normal food expenditures--and the expenditures of literally thousands of Alabama poor people represented by the appellants--are substantially below the excessive prices that have kept them out of the program. Appellants can prove that there are thousands of hard-core poor people in Alabama with no income and therefore no food expenditures whatsoever; that the appellee Department and other agencies have data which corroborate this fact; and that charging such individuals prices for their stamps (e.g., family of six, with no income whatsoever, must pay a three-dollar monthly charge for the stamps) is violative of the Act. Appellants wish to show that the stamp price schedules were set by administrative whim and expedience and--as witnessed by recent minor price changes for certain income groups (effective February 1, 1969)--political pressures which bear no relevance to the statutory standard. Finally, appellants wish to show that purchase requirements are so high as to substantially impair the purpose of the program; that a majority of the people eligible for the program

cannot afford to pay the stamp prices; and that there is no adequate basis for denying appellants an administrative determination of individual complaints that scheduled purchase requirements are not "equivalent to a household's normal expenditures for food" (quoting from Section 7(b) of the Act).

B. Appellants have standing to challenge, as a denial of equal protection, appellees' issuance of a greater amount of food stamps to families with more income but identical nutritional needs.

The value of the food stamps, issued to families who can afford them, is established by a schedule prescribed by the appellees. Families of one size do not ordinarily get the same amount of stamps as families of identical size. The stamp allotment is determined by the family's income. Families with less income receive smaller stamp allotments than higher-income families, even though their unsatisfied nutritional needs are just as great. The sole basis for providing different stamp allotments to identical-size households is the varying amount of income that such families receive. Since the Act requires that families expend their normal food expenditures in order to obtain the stamps (Section 7 (b) of the Act 7 U.S.C. 2016(b)), the allotments provided to recipients will determine how much food they will monthly have available to them.

The differences are very substantial. A family of three with a monthly income of $0-19.99 receives $38 worth of stamps;

a family of identical size making $230-249.99 receives $80 worth of stamps. Similarly, a family of four with a monthly income of $0-29.99 receives $48 worth of stamps; a family of identical size making $280-309.99 receives $94 worth of stamps. Once again, a family of five with $0-29.99 in income receives a stamp allotment of $60; a family of identical size receives $110 worth of stamps. This discrimination exists in the case of every size of family.

Appellants are aggrieved by this practice since they represent the class that receives fewer stamps due to their smaller incomes. See, herein, footnote on pp. 8-9. Due to appellees' practice, appellants' families are less likely to receive an adequate nutritional diet than more prosperous, higher income families. This, inevitably, has subjected them to the severe consequences of hunger and malnutrition. In most instances, this means that appellants run out of food near the middle of the month, making their subsistence dependent upon communal living, irregular handouts, and unusual substances.

Appellees' practice of giving smaller food stamp allotments to persons with lower income--but with identical nutritional needs--denies the poorest recipients of their right to equal protection of the laws. Although it is not contended herein that there is a constitutional right to federal food benefits, it is asserted that appellees must administer the Food Stamp program in compliance with the dictates of equal protection. The fact that the program

was established by statute does not lessen appellants rights to constitutional protection in accompaniment with its entitlements. Sherbert v. Verner, 374 U.S. 398 (1963); Fleming v. Nestor, 363 U.S. 603 (1960). Once the government decides to create a program of benefits for its citizens, it cannot arbitrarily deny those benefits to some while conferring them on others. Griffin v. Prince Edward County School Board, 377 U.S. 218 (1964); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967); Ramos v. Health and Social Services Bd., 276 F. Supp. 474 (E.D. Wisc. 1967); Green v. Dept. of Public Welfare, 270 F. Supp. 173 (D. Del. 1967); Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967); aff'd on diff. ground, 392 U.S. 309 (1968). That the requirements of equal protection apply to the federal government through the Fifth Amendment is now well settled. Bolling v. Sharpe, 347 U.S. 497 (1954); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967).

The Supreme Court's statement of the meaning of the equal protection clause back in 1879 remains relevant today:

> It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. Missouri v. Lewis, 101 U.S. 22, 31 (1879).

The same thought is echoed in modern opinions of the court which take the view that equal protection requires "uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." Reynolds v. Sims, 377 U.S. 533, 565 (1964). All participants in the Food Stamp program, regardless of income, stand in the same relation to the governmental action being challenged, in this case, and deserve to be treated equally.

In Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), the Supreme Court rightly indicated that practices challenged under the equal protection clause will receive stricter scrutiny in accordance with the importance of the right being asserted:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. Ibid., at 670.

The fundamental right asserted in Harper was the right to vote, and, after close scrutiny, Virginia's poll tax was held in violation of the equal protection clause. The right to vote was also considered in Reynolds v. Sims, supra, and after close scrutiny, "overweighting or diluting" the efficacy of the vote was held unconstitutional under the equal protection clause. Examples of other fundamental rights--which require close scrutiny for their

protection--include the right to education (Griffin v. Prince Edward County School Board, 377 U.S. 218 (1964); Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. Ga. 1961), aff'd. 368 U.S. 575 (1962)) and the right of procreation (Skinner v. Oklahoma, ex rel. Williamson, 316 U.S. 527 (1942)). Appellants submit that their right to food, the very means of existence, is no less worthy of such protection.

Close scrutiny is also required when the rights of the poor or politically powerless are affected. This rule was originally suggested by the Supreme Court in United States v. Carolene Product Co., 304 U.S. 144, 152-153, n. 4 (1938):

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Close judicial scrutiny, then, is required whenever invidious classifications burdening the poor have provided the basis for discriminatory treatment. Classification based on race, for example, must be subject to "the most rigid scrutiny". Loving v. Virginia, 388 U.S. 1 (1967); see also, McLaughlin v. Florida, 379 U.S. 191 (1964); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886). The same is true for classifications based on alienage, Truax v. Raich, 239 U.S. 33 (1915); indigence, Griffin v. Illinois, 351 U.S. 12 (1967);

and illegitimacy. Levy v. Louisiana, 391 U.S. 68 (1968). In general "[d]iscriminations of [such] unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." Morey v. Doud, 354 U.S. 457 (1957).

Restatement of the principle, and its applicability to classifications based on indigence, appeared recently in the opinion of Circuit Judge Skelly Wright in Hobson v. Hansen, 269 F. Supp. 401, 507-508 (D.D.C. 1967):

> The explanation for this additional scrutiny of practices which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interest. This confidence is often misplaced when the vital interests of the poor and of racial minorities are invoked. For these groups are not always assured of a full and fair hearing through the ordinary political processes; not so much because of the chance of outright bias, but because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities and the poor, than would otherwise be necessary.

The practices that are challenged here, therefore, must be subjected to strict judicial scrutiny. The right involved is the right "more nearly to obtain a low-cost nutritionally adequate diet." 7 U.S.C. 2016 (a). The consequences of arbitrary

administrative interference with attainment of this objective is severe and injurious. The right involved is as "fundamental" as any of those discussed above--education, voting, or procreation--since it is the basis of life itself. The minority affected--the poorest of the poor--is as "discrete and insular" from "the ordinary political processes" as any which may be found in the nation.

Appellants' claims are, therefore, clearly substantial; their right to assert their grievance is patently clear. As Mr. Justice Black stated in Griffin v. Illinois, 351 U.S. 12, 19 (1967): "[T]here can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." Similarly, under the Food Stamp program, there can be no equal justice where the amount of food made available is inversely related to a man's income.

C. Appellants have standing to challenge appellee Secretary's failure to distribute commodities pursuant to the "emergency" provisions of the Food Stamp Act.

Under the provisions of the Food Stamp Act, a county or city is normally only permitted to operate either the Commodity Distribution or the Food Stamp program, not both. Under those same provisions, however, the appellee Secretary is required to determine when "emergency situations" exist in order that direct distribution of commodities can supplement food stamp benefits.

7 U.S.C. 2013(b). Congress intended that the Secretary determine whether financial inability to obtain the benefits of the Food Stamp program existed so that free food could be distributed in such "emergency" areas. Despite the fact that vast amounts of Alabama's poor exist under this Nation's most severe conditions of malnutrition,* and despite other natural hardships which should by themselves require implementation of the "emergency" provisions,

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* An Alabama survey of over 1800 Negro heads of households representing families totaling over 10,000 persons, has clearly documented the extent and effect of the pervasive condition of malnutrition in appellants' State. The story that survey told follows the litany:

> [B]abies whose mothers are unable to nurse them receiving no milk at all but fed instead with water drawn directly from wells and creeks.
> [C] hildren showing the listlessness characteristic of malnutrition, who let flies climb around their eyes and mouths, who show little interest in playing with each other, who just sit idly when not working, who sleep a great deal in school.
> [A]dults suffering from cycles of dizziness and 'fallinout,' who find upon visiting the doctor that they need to discontinue starchy and fatty food--pork products, especially fatback and cornbread, biscuits, beans and grits--their basic diet.
> [W]omen who have become bloated from poor diet.
> Hunger, U.S.A. (1968), p. 18, summarizing the results of an Alabama survey conducted by the Southern Rural Research Project in conjunction with Tuskegee Institute.

the appellee Secretary has failed and refused to determine whether such an "emergency" exists in the State of Alabama and has failed and refused to make food available to needy people there.

When the "emergency" provision was discussed on the floor of the House, Congressman Jones from Missouri asked the Agriculture Committee Chairman, Congressman Cooley, for assurance that food would be directly distributed to needy people wherever hunger persisted in food stamp areas. Congressman Cooley clearly enunciated the intent with which his committee drafted the bill:

> MR. COOLEY: . . . [W]hat [the gentleman] has been talking about is taken care of . . . . I think it is perfectly clear that the program would be in operation in disaster areas, wherever the area, or wherever there is economic need.
> 110 Cong. Rec. 16824 (1964) (emphasis added)

When Chairman Cooley was further pressed, in later debates, on whether commodities would be distributed when many households could not afford the stamps, the following response was given:

> Mr. Speaker, I share the concern of the gentleman from Missouri [Mr. Jones] about a situation in which . . . . because of the exigencies of circumstances or some peculiarity of State law, a substantial number of families who, for part of the year, for example, might not be able to participate in the food stamp program or to obtain local relief. It would be unconscionable that the provisions of this law, which is designed to alleviate hunger, should deprive persons in such circumstances from the benefits they would otherwise receive under the direct distribution program . . . .
> . . . . If there are circumstances in any community which would prevent many households from being

> eligible to participate in the food stamp program for a temporary period, it seems to me that this could qualify such an area under the "emergency situation" provision of the Senate bill and that the Secretary of Agriculture would be permitted by the language of the Senate bill to institute a direct distribution program of such scope and for such period of time as he might determine necessary to take care of these families.
>
> I have discussed this matter with the Secretary of Agriculture and he informs me that this is the manner in which he believes the language should be construed if the bill is enacted as amended.
> 110 Cong. Rec. 18925-26 (1964)

The legislative intent of the "emergency" provision is, therefore, rather clear. The legislative history commits not only Congress but (by imputation) the appellee Secretary himself to the recognition of an "emergency" in a situation of need and non-receipt of food stamps among a substantial number of families. In such instances, food should be directly distributed to those families.

Appellants and members of their class are financially unable to obtain the benefits of the Food Stamp program because the prices are prohibitively high. As aforementioned, an overwhelming majority of Alabama's welfare recipients have been unable to purchase the stamps, therefore being entirely excluded from the program's benefits. Their non-participation in the program, during the period of October 1966 to September 1967, amounted to the following: Bullock County - 87.3%; Dallas County - 86.3%; Greene County - 91.6%;

Hale County - 75.5%; and Perry County - 64.7%. United States Commission on Civil Rights, Staff Report, Health, Welfare, and Food Programs in Alabama (1968), p. 7.

Furthermore, the lack of cash income and the injurious effects of inadequate nutrition have been aggravated by natural causes. Inter alia, the production of cotton from the 1967 crop was the smallest since 1895 (and many of the appellants and members of their class derive their income wholly or substantially from the production of cotton); weather temperatures during the months of November and December 1967 and January and February 1968 were unusually low; and an epidemic of influenza has inflicted incapacitating illness on many of the named appellants and members of their class. See Appellants' Complaint, pp. 21-22. Due to these conditions, the appellee Secretary, under a similar provision in another statute,* designated many of the counties in which appellants reside as "emergency areas," thereby making credit, through federal loans, available to many farmers. The hardships caused to appellants, due

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* "The Secretary may designate any area in the United States and in Puerto Rico and the Virgin Islands as an emergency area if he finds (1) that there exists in such area a general need for agricultural credit which cannot be met for temporary periods of time by private, cooperative, or other responsible sources (including loans the Secretary is authorized to make under subchapter I of this chapter or any other Act of Congress), at reasonable rates and terms for loans for similar purposes and periods of time, and (2) that the need for such credit in such areas is the result of a natural disaster." 7 USC §1961(a). Subsection (b) authorizes the Secretary to make loans in such areas.

to this emergency, are of no lesser consequence than those that have befallen the farmers assisted under 7 USC 1961; most of the appellants, already suffering from extreme poverty and inability to pay for the stamps, depended upon the crops which failed as a means of providing the cash for meeting appellees' stamp purchasing requirements.

Despite this evidence the Secretary has withheld any determination whether "emergency situations" warrant the distribution of free food in Alabama. Under Section 10 (a), (c) and (e) (A), 5 USC §§ 702, 704, 706 (1) of the Administrative Procedure Act the court may enforce the Secretary's duty to make a determination and to make his findings known when evidence of the character presented here arises. Whatever may be the extent of the Secretary's discretion in applying the statutory standard in the determination, Congress clearly meant section 4(b) of the Food Stamp Act to have some force which could not be nullified by the Secretary's withholding any determination; and the Secretary's failure to act is therefore reviewable. Cappadora v. Celebrezze, 356 F.2d 1, 5-6 (2d Cir. 1966); Ferry v. Udall, 336 F.2d 706, 711-12 (9th Cir. 1964); Deering Milliken Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); Schonfeld v. Wirtz, 258 F. Supp. 705 (S.D.N.Y. 1966).

Not only has the appellee Secretary failed to comply with a clear statutory intent to provide commodities in the above-described circumstances in Alabama, but, as government counsel clearly stated, the Secretary has compounded frustrations of Congressional purpose by failing to establish any guidelines whatsoever which would indicate when he would exercise his "emergency" mandate. Transcript of Proceedings on Motion to Dismiss (August 28, 1968), pp. 90-94. Since the drastic conditions of hunger that pervade Alabama are as severe as in any place in the country, it is difficult to imagine what situation would ever make the Secretary give some force to the "emergency" provision. As matters stand for appellants in Alabama, the statutory language and Congressional purpose are a nullity. Surely appellants have standing to challenge this unlawful inaction.

D. Appellants have standing to challenge appellees' frustration of Congressional purpose through its administration of the Commodity Distribution program without regard to whether recipients have a secondary and substantial source of food and without regard to the nutritional adequacy of the food provided.

The Commodity Distribution program has a purpose so necessary to the process of human survival in this country that the amount provided far surpasses mere administrative considerations.

By administering the program in a manner which only caters to the needs of farmers--by making it solely a surplus removal and price support program--the appellees have so aggrieved appellants and so frustrated Congressional purpose that unconscionable conditions of hunger and malnutrion have gone unabated. The amount of food provided is admittedly inadequate and, alone, could not maintain a person at a reasonable level of nutrition and health. If a family had to live on commodities in the amount and kinds issued under the direct distribution program, health would be impaired and life itself threatened by susceptibility to disease.

Yet, as the United States Commission on Civil Rights has noted, there are thousands of people in Alabama who look to the commodities program for survival. In a report prepared last year,

> the Commission found that many needy families depend on (the) commodities as their major source of food. The commodities currently distributed do not provide nutritionally-adequate diets. Secretary Freeman has indicated that he has the power to spend Section 32 funds to increase the variety of commodities distributed to the needy. Yet, he has returned to the United States Treasury in the last ten years over $902 million in unused Section 32 funds. . . . United States Commission on Civil Rights, Staff Report, Health, Welfare, and Food Programs in Alabama (1968), p. 11.

It is unquestionable that the returning of these substantial funds, appropriated for the Commodity Distribution program, has distorted the Congressional intent to more adequately feed the needy. This practice over the past decade will go unabated. That the Department will continually frustrate Congressional will, by

returning substantial appropriations to the Treasury, is evident by its (in)actions after the filing of the suit at bar; at the end of the last fiscal year, the Department had approximately $527 million of Section 32 appropriations left unspent, $227 million of which it directly returned to the Treasury. Appellants are certain that discovery would show that appellees will not change these practices whatsoever during this fiscal year as well.

No where in the legislation of Section 32, 7 U.S.C. 612(c), is there any indication that the direct distribution program is to be limited to "surplus" commodities. The word "surplus", or any phrase denoting a similar meaning, is not once mentioned in the statute. Yet the Department of Agriculture has totally limited the program to what it deems to be "surplus commodities"--commodities which are wholly inadequate for human nutritional needs. This administrative policy has caused appellants immeasurable harm in health and spirit. As discovery would clearly show, this policy has lead to distribution of commodities which are limited in quality and quantity; everywhere in Alabama, the retail value of the distribution package approximates $8 per person per month.

Congress in authorizing the direct distribution program prescribed that food be provided for "the assistance of needy persons" and "low-income persons." 7 U.S.C. 1431, 612(c). The determination of the amount of food provided to appellants and

members of their class altogether without regard to whether they have another regular and substantial source of food is arbitrary and violates the intent of Congress for the direct distribution program. "Need" in this context refers to insufficiency of food for one's health and nutritional requirements. It denotes the beneficiaries of the program and the measure of benefits, just as in the federally-funded public assistance programs where the test of "need" determines both who may receive financial aid and how much aid they receive."* It's too strange to image that Congress would enact a program for the "needy" aged or blind and that the Secretary of Health, Education and Welfare could order that all such needy aged and blind persons be paid $50 or $75 or $100 or some other amount totally unrelated to what the individual lacked to meet the cost of basic living requirements.

Appellees administration of the program, as described above, has totally read out Congressional intentions to feed the hungry and malnourished. Based on administrative expedience and greater political sympathy for the farmer than the poverty-stricken, the Commodity Distribution program has become so emasculated that Congress would have difficulty recognizing its own creation. The aggrieved appellants certainly have standing to challenge the unlawful administrative practices that have deprived them of their food entitlements.

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* Cf. Old Age Assistance, 42U.S.C. 301 et seq.; Aid and Services to Needy Families with Children, 42 U.S.C. 601 et seq.; Aid to the Blind, 42 U.S.C. 1201 et seq.; and Aid to the Permanently and Totally Disabled, 42 U.S.C. 1351 et seq.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded for trial.

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January 20, 1969

CERTIFICATE OF SERVICE

I, RONALD F. POLLACK, being duly sworn, depose and say that service of the foregoing Brief for Appellants, United States Court of Appeals for the District of Columbia, has been made upon the appellees by mailing a copy thereof by first class mail on the 21st Day of January, 1969, to David G. Bress, United States Attorney, Joseph M. Hannon, Assistant United States Attorney, and Nathan Dodell, Assistant United States Attorney, at Room 3136-C, United States Court House Building, Third and Constitution Avenue N.W., Washington, D.C. 20001.

Ronald F. Pollack
RONALD F. POLLACK

Sworn to before me this
21st Day of January, 1969

Henry A. Freedman
Notary Public

HENRY A. FREEDMAN
Notary Public, State of New York
No. 31-6[illegible]
Qualified in New York County
Commission Expires March 30, 1970

BRIEF FOR THE APPELLEES

IN THE UNITED STATES ~~DISTRICT~~ COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22574

ARLEIT PEOPLES, ET AL.,

Appellants

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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I N D E X

CITATIONS

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Cases Continued: Page

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IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPELLEES

STATEMENT OF THE ISSUES

Plaintiffs-appellants brought this action in the District Court seeking declaratory and injunctive relief to compel the Secretary of Agriculture and subordinate officials to revise and greatly increase the Food Stamp Program (7 U. S. C. § 2011 et seq.) and the Commodity Distribution Program (7 U. S. C. §§ 612c and 1431, and 15 U. S. C. § 713c). The District Court granted the Government's motion to dismiss on the ground that the plaintiffs possessed no judicially enforceable rights and that the court lacked jurisdiction over the subject matter.

The issues on appeal are:

(1) Whether the District Court lacked jurisdiction to review the discretionary actions of administrative officials under statutory enactments which are permissive in character.

(2) Whether the plaintiffs lack standing to sue since the statutes involved create no individual or personal rights of action in the plaintiffs.

(3) Whether the suit is with respect to a subject matter as to which the United States, an indispensable party, has not consented to be sued.*

COUNTER-STATEMENT OF THE CASE

By this action, plaintiffs seek to compel the Secretary of Agriculture to take certain action in connection with his administration of certain Family Food Assistance Plans, specifically the Commodity Distribution Program and the Food Stamp Program.

As is developed in greater detail below, the Commodity Distribution Program, in the form in which it is here involved, represents the means selected by the Secretary of Agriculture to carry out the authority granted him by clause (2) of § 32 of Public Law 320, 74th Congress, as amended (7 U. S. C. §612c), and § 416 of the Agricultural Act of 1949, as amended (7 U. S. C. § 1431) to utilize surplus agricultural commodities to assist needy persons. Regulations governing the operation of the program are published in 7 CFR Part 250. Under these regulations surplus commodities, in consumer sized packages, are made available to "distributing agencies" which are "State, Federal or private agencies which enter into agreements with the Department [of Agriculture] for the distribution of commodities

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* This case was previously before this Court on plaintiffs' appeal from the denial of their motion for a preliminary injunction (No. 21773).

to eligible * * * recipients" (7 CFR § 250.3(e)). The commodities are distributed in kind to participating households under and in accordance with the approved plans of operations which must meet the minimum criteria established in the regulations (7 CFR § 250.6(e)). Since the legislation contemplates that only those commodities in surplus supply will be available for distribution, the regulations set an order of priorities of recipient agencies (7 CFR § 250.4).

For its part, the Food Stamp Program, for which provision is made in the Food Stamp Act of 1964, 7 U. S. C. § 2011 et seq., is designed to increase the utilization of foods and cause "the distribution in a beneficial manner of our agricultural abundances" and thus "strengthen our agricultural economy." The program contemplates that the "Nation's abundance of food [shall] be utilized cooperatively by the States, the Federal Government, and local units to the maximum extent practicable to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households" (7 U. S. C. § 2011).

The program is available only on "request of an appropriate State agency" to provide "eligible households * * * with an opportunity more nearly to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment [having] a greater monetary value than their normal expenditures for food." The coupons thus obtained by the households participating in the program must "be used only to purchase food from retail food stores which have been approved for participation in the program" (7 U. S. C. § 2013(a); emphasis supplied).

A. The Commodity Distribution Program

1. Statutory Provisions

Section 32 of the Act of August 24, 1935 (49 Stat. 774), as amended, appropriates for each fiscal year "an amount equal to 30 per centum of the gross receipts from duties collected under the customs laws during the period January 1 to December 31, both inclusive, preceding the beginning of each such fiscal year," and such sums "shall be maintained in a separate fund and shall be used by the Secretary of Agriculture only to (1) encourage the exportation of agricultural commodities and products thereof * * *; (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce or by increasing their utilization through benefits, indemnities, donations or by other means, among persons in low income groups as determined by the Secretary of Agriculture; and (3) reestablish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption." 7 U. S. C. § 612c. The determinations by the Secretary of Agriculture as to what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption "shall be final." Ibid. The sums thus appropriated by Congress "shall be expended for such one or more of the above-specified purposes, and at such times, in such manner, and in such amounts as the Secretary of Agriculture finds will effectuate substantial accomplishment of any one or more of the purposes of this section." Ibid.

In carrying out clause (2) of § 32 of the Act of August 24, 1935 (49 Stat. 774), as amended, "the funds appropriated by said section may be used for the purchase, without regard to the provisions of existing law governing the expenditure of public funds, of agricultural commodities and products thereof, and such commodities * * * may be donated for relief purposes and for use in nonprofit summer camps for children." 15 U. S. C. § 713c.

Another statutory provision underlying the Commodity Distribution Program is § 416 of the Agricultural Act of 1949, as amended (Public Law 89-808, 80 Stat. 1538), which provides that in order "to prevent the waste of commodities whether in private stocks or acquired through price-support operations by the Commodity Credit Corporation before they can be disposed of in normal domestic channels without impairment of the price-support program or sold abroad at competitive world prices, the Commodity Credit Corporation is authorized, on such terms and under such regulations as the Secretary of Agriculture may deem in the public interest: (1) upon application, to make such commodities available to any Federal agency for use in making payment for commodities not produced in the United States; (2) to barter or exchange such commodities for strategic or other materials as authorized by law; (3) in the case of food commodities to donate such commodities to the Bureau of Indian Affairs and to such State, Federal, or private agency or agencies as may be designated by the proper State or Federal authority and approved by the Secretary, for use in the United States in nonprofit school-lunch programs, in nonprofit summer camps for children, in the assistance of needy persons, and in charitable institutions, including hospitals, to the extent that needy persons are served. In the case of clause (3) the Secretary shall

obtain such assurance as he deems necessary that the recipients thereof will not diminish their normal expenditures for food by reason of such donation. * * *." 7 U. S. C. Supp. III § 1431. "Determinations made by the Secretary under this Act shall be final and conclusive: Provided, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act." 7 U. S. C. § 1429.

2. Administrative Regulations

The administrative regulations with respect to the Commodity Distribution Program prescribe the terms and conditions "under which commodities may be obtained by Federal, State and private agencies for use in the United States in schools operating nonprofit school-lunch programs, in nonprofit summer camps for children, by needy Indians on reservations, in institutions, in State correctional institutions for minors, and in the assistance of other needy persons." 7 CFR § 250.1(a). "Commodities shall be available only for distribution and use in accordance with the provisions" of the administrative regulations. 7 CFR § 250.4(a). "The quantity of commodities to be made available for donation * * * shall be determined in accordance with the pertinent legislation and the program obligations of the Department, and shall be such as can be effectively distributed in furtherance of the objectives of the pertinent legislation." 7 CFR § 250.4(b).

"Distributing agencies shall determine that recipient agencies or recipients to whom they distribute commodities are eligible" under the administrative regulations, and shall impose "upon public welfare agencies

the responsibility for determining that recipients to whom welfare agencies distribute commodities are eligible." 7 CFR § 250.6(a). The categories of households to which distribution may be made are set forth in the administrative regulations. 7 CFR § 250.6(e). Those households are identified as (1) public assistance households and (2) nonpublic assistance households. Ibid. The "public assistance households" include those households in which (1) all members are receiving benefits under the federally-aided public assistance programs for the needy authorized in the Social Security Act or under State or local welfare programs, or (2) those households in which some of the members receive such benefits, but all members thereof are included in the determination to grant such benefits, or (3) those households in which all members are recipients of assistance from grants under a Work Experience and Training Program. 7 CFR § 250.6(e)(1)(i). The "non-public assistance households" include those households in which none of the members receive benefits as described in 7 CFR § 250.6(e)(1)(i) or in which some of the members receive such benefits but all of the members are not included in the determination to grant such benefits. 7 CFR § 250.6(e)(1)(ii).

It is provided in 7 CFR § 250.6(g) that "[c]ommodities shall be distributed only to recipient agencies and recipients eligible to receive them" pursuant to 7 CFR §§ 250.8 and 250.9. "Needy persons in households are eligible to receive commodities" pursuant to the regulations. 7 CFR § 250.9(a). The term "needy persons," as defined in the regulations, "means (1) persons served by institutions who, because of their economic status, are in need of food assistance, and (2) all the members of a household which is certified as in need of food assistance." 7 CFR § 250.3(m).

B. The Food Stamp Program

1. Statutory Provisions

The Food Stamp Act of 1964 (7 U. S. C. § 2011 et seq.), providing specific and detailed legislation for a food stamp program which had been commenced as a pilot program under § 32 of the Act of August 24, 1935 (49 Stat. 774), as amended (7 U. S. C. § 612c), authorizes the Secretary of Agriculture "to formulate and administer a food stamp program under which, at the request of an appropriate State agency, eligible households within the State shall be provided with an opportunity more nearly to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment which shall have a greater monetary value than their normal expenditures for food." 7 U. S. C. § 2013(a). "Households shall be charged such portion of the face value of the coupon allotment issued to them as is determined to be equivalent to their normal expenditures for food." 7 U. S. C. § 2016(b).

"Participation in the food stamp program shall be limited to those households whose income is determined to be a substantial limiting factor in the attainment of a nutritionally adequate diet." 7 U. S. C. § 2014(a). "In complying with the limitation on participation set forth * * * [in 7 U. S. C. § 2014(a)], each State agency shall establish standards to determine the eligibility of applicant households. Such standards shall include maximum income limitations consistent with the income standards used by the State agency in administration of its federally aided public assistance programs. Such standards also shall place a limitation on the resources to be allowed eligible households.

The standards of eligibility to be used by each State for the food stamp program shall be subject to the approval of the Secretary." 7 U. S. C. § 2014(b).

"The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons * * *." 7 U. S. C. § 2019(b). "In the certification of applicant households for the food stamp program there shall be no discrimination against any household by reason of race, religious creed, national origin, or political beliefs." 7 U. S. C. § 2019(c).

"In areas where a food stamp program is in effect, there shall be no distribution of federally owned foods to households under the authority of any other law except during emergency situations caused by a national or other disaster as determined by the Secretary." 7 U. S. C. § 2013(b).

The Secretary is authorized by the Food Stamp Act of 1964 to "issue such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program." 7 U. S. C. § 2013(c).

Judicial review is provided for by the Food Stamp Act of 1964, but the scope of judicial review is limited by the terms of the Act. Whenever "an application of a retail food store or wholesale food concern to participate in the food stamp program is denied," or whenever "a retail food store or a wholesale food concern is disqualified" under 7 U. S. C. § 2020, or whenever "all or part of any claim of a retail food store or wholesale food concern is denied" under 7 U. S. C. § 2021, an administrative proceeding is authorized and subsequent judicial review is provided for by the terms of the statute. 7 U. S. C. § 2022. The suit in the

United States District Court or in any court of record in the State having competent jurisdiction "shall be a trial de novo by the court," and if the court determines that "such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence." 7 U. S. C. § 2022.

2. Administrative Regulations

The Secretary's regulations for the Food Stamp Program prescribe "the manner in which eligible households can obtain and use coupons issued to them" by State agencies. 7 CFR § 1600.1. The term "eligible household," as defined in the administrative regulations, "means a household that lives in a project area and whose income and resources are determined to be a substantial limiting factor in the attainment of a nutritionally adequate low-cost diet." 7 CFR § 1600.2(j). The term "project area" means "the political subdivision within a State which has been approved for participation in the Program" by the administrative agency. 7 CFR § 1600.2(u). "The State agency shall * * * be responsible for the administration of the Program within the State, including, but not limited to, the certification of applicant households * * *." 7 CFR § 1600.3(b).

The regulations provide that: "Households in which all members thereof are recipients of welfare assistance under (1) federally aided public assistance programs, or (2) State or local general assistance programs applying the criteria of need which are the same as, or similar to, those applied under any such federally aided programs, shall be determined to be low-income households and, therefore, eligible to

participate in the Program while receiving such benefits." 7 CFR § 1601.3(b). Other households, including those in which some members are recipients of the types of assistance set forth in 7 CFR § 1601.3(b) "shall be determined to be low-income households and, therefore, eligible to participate in the Program if the economic status of the members who are not recipients of welfare assistance meet the standards of eligibility established in accordance with" 7 CFR § 1601.1(f). 7 CFR § 1601.3(c). Additional households may be eligible to participate in the program pursuant to criteria specifically approved by the administrative agency. 7 CFR § 1601.3(d).

"A food retailer or food wholesaler aggrieved by administrative action * * * may within ten days of the date of delivery to the firm of notice of such administrative action, file a written request for review of such administrative action with the Food Stamp Review Officer." 7 CFR § 1602.8(a). The rules governing administrative review are set forth in 7 CFR § 1603.1 et seq.[1/]

C. The Proceeding in the District Court

Plaintiffs alleged in their complaint that they "have been denied their right to secure adequate benefits" under the Food Stamp Program (7 U. S. C. § 2011 et seq.) and the Commodity Distribution Program

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1/ As previously noted, judicial review is provided for in 7 U. S. C. § 2022.

(7 U. S. C. §§ 612c and 1431, and 15 U. S. C. § 713c). The action is assertedly brought by the plaintiffs on their own behalf and on behalf of other persons who are similarly situated. Declaratory and injunctive relief are sought by the plaintiffs with respect to the alleged improper, unjust, and discriminatory administration of the Food Stamp Program and the Commodity Distribution Program.

Specifically, the complaint seeks injunctive relief compelling the Secretary to (1) provide food assistance in all Alabama counties; (2) determine the amount of surplus food commodities distributed to recipients "with regard to whether recipients have a secondary and substantial source of food [and with regard] to the amount and kinds of food necessary * * * to maintain a reasonably adequate level of nutrition and health"; (3) issue food stamps without charge to plaintiffs who have "negligible or no 'normal expenditures for food'"; (4) provide either for evidentiary determinations for each eligible household of its "normal expenditures for food" or provide schedules of issuance low enough to "guarantee that households pay no more than their 'normal expenditures for food'"; and (5) declare "emergency situations caused by a national or other disaster" to exist in Alabama and to issue surplus food commodities "to persons in need thereof in counties participating in the Food Stamp Program."[2/]

The plaintiffs' motion for preliminary injunction was denied by the District Court. On plaintiffs' appeal from that denial, this Court found "no basis to disturb the denial of a preliminary injunction."

2/ In this Court, however, plaintiffs appear not to rely upon the demand in the complaint that the Secretary be required to furnish free food stamps. The demand that food assistance programs be put into effect in all Alabama counties is now moot.

Thereafter, the District Court granted the Government's motion to dismiss. It concluded that the statutory provisions for the Commodity Distribution Program were designed by Congress "to improve farm prices and income by removing price-depressing surpluses of agricultural commodities." As the court pointed out, the Food Stamp Act and the Commodity Distribution Program "have as their primary purpose the improvement of the nation's agricultural economy by the removal of surplus stocks of agricultural commodities from the market," and "to aid in the distribution of agricultural surpluses and to encourage the domestic consumption of agricultural commodities." The court also concluded that, in furtherance of the Congressional policy to improve the agricultural economy, Congress also desired that "the nation's agricultural abundances be used to assist needy persons by supplementing their diets," but Congress "recognized that these programs would not alone assure an adequate diet to recipients."

In view of the Congressional policy and the statutory provisions, the court ruled that the statutory measures create in the plaintiffs "no rights enforceable by this Court," and that the court "lacks jurisdiction over the subject matter of this case." Accordingly, it entered an order dismissing the complaint.

STATUTES INVOLVED

The statutes involved are reproduced, in pertinent part, in the Appendix, infra.

ARGUMENT

The District Court Correctly Decided That It Lacks Jurisdiction to Review the Discretionary Actions of the Administrative Officials Pursuant to Statutory Measures Which Are Permissive in Character

The gravamen of the complaint relates to administrative action under statutory measures which vest in the Secretary of Agriculture discretionary authority to establish and administer the Food Stamp Program (7 U. S. C. § 2011 et seq.) and the Commodity Distribution Program (7 U. S. C. §§ 612c and 1431, and 15 U. S. C. § 713c).

The District Court concluded, in dismissing the complaint, that the statutory enactments confer on the plaintiffs "no rights enforceable by this Court," and the court "lacks jurisdiction over the subject-matter of this case." As we shall now show, this conclusion was correct.

A. Jurisdiction Is Conferred on the District Court, by the Food Stamp Act of 1964, With Respect to Certain Administrative Actions, But Not the Administrative Actions Involved Here. Since the Issues Relate to Matters Not Within the Carefully Prescribed Authorization for Judicial Review, the Court Lacks Jurisdiction

The Food Stamp Act of 1964 specifies the jurisdiction of the courts relative to judicial review of administrative actions. 7 U. S. C. §§ 2020-2022. Whenever "an application of a retail food store or wholesale food concern to participate in the food stamp program is denied," or whenever "a retail food store or a wholesale food concern is disqualified" under 7 U. S. C. § 2020, or whenever "all or part of any claim of a retail food store or wholesale food concern is denied" under

7 U. S. C. § 2021, an administrative proceeding is authorized and subsequent judicial review is provided for by the terms of the statute. 7 U. S. C. § 2022. See also, 7 CFR §§ 1603.1-1603.10. The suit in the United States District Court or in any court of record in the State having competent jurisdiction "shall be a trial de novo by the court," and if the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence. 7 U. S. C. § 2022.

When the Congress intended for administrative action under the Food Stamp Act to be subject to judicial review it expressly said so, and, accordingly, conferred jurisdiction on the courts. 7 U. S. C. §§ 2020-2022. Plainly, Congress was aware of the subject of judicial review with respect to administrative action under the statute, and Congress carefully prescribed the metes and bounds of judicial review and within specified limits vested jurisdiction in the courts. Ibid. Since the plaintiffs and the issues presented by the plaintiffs do not come within the statutory provisions for judicial review and since the Act contains no other authorization for judicial review of administrative action, there is no basis in the Act for the plaintiffs' contention that the District Court has jurisdiction to resolve the issues in the case.

In short, provisions for judicial review were carefully included in the Food Stamp Act with respect to particular types of administrative action and carefully omitted with respect to any other type of administrative action. Here, as in Iselin v. United States, 270 U. S. 245, 250-251, the "statute was evidently drawn with care," and what the plaintiffs seek "is not a construction of a statute, but, in effect, an

enlargement of it by the court, so that what was omitted * * * may be included within its scope * * *." But it was concluded in the Iselin case that to "supply omissions [in a statute] transcends the judicial function." Ibid.

The plaintiffs' argument for judicial review does violence even to a cursory reading of the Act. Not only is there no statutory provision for judicial review of the administrative actions involved in this case, but, in addition, the carefully written provisions in the Act for judicial review with respect to some types of administrative action - and the omission of statutory provisions for judicial review with respect to any other type of administrative action - preclude reading in as implied that which was omitted. When a provision is carefully included in one place in a statute and omitted in another place, there is no ground for reading it in as implied where it is omitted. Lang v. Commissioner, 289 U. S. 109, 112; Corn Products Refining Co. v. Benson, 232 F. 2d 554, 562 (C. A. 2); Hamilton v. National Labor Rel. Board, 160 F. 2d 465, 470 (C. A. 6), certiorari denied sub nom., Kalamazoo Stationery Co. v. National Labor Rel. Board, 332 U. S. 762.

A "contrast goes far to show" Congressional intent with respect to whether jurisdiction is vested in the courts to review administrative action in an instance in which the statute authorizes review in some situations but does not provide for judicial review in other situations. Mario Mercado E Hijos v. Benson, 97 U. S. App. D. C. 298, 231 F. 2d 251, 252. This principle was decisive in T.I.M.E. Inc. v. United States, 359 U. S. 464, 471, in which it was said that to "hold that the Motor Carrier Act nevertheless gives shippers a right of reparation with

respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carrier in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which establish that right in Part I were wholly omitted in the Motor Carrier Act" (ibid.).

This principle is relevant to constitutional issues as well as to other issues. Here, as in Mario Mercado E Hijos v. Benson, 97 U. S. App. D. C. 298, 231 F. 2d 251, 252, the statute "provides for no review of the sort of [administrative] action involved in this case," and the case should, therefore, be dismissed for lack of jurisdiction (id. at 253) even though it was alleged by the plaintiff that the Secretary of Agriculture held "a constitutionally inadequate hearing and fixed a confiscatory rate which deprives appellant [i.e., the plaintiff] of property without due process of law" (id. at 252).

The authority of Congress to withhold judicial review of administrative action is established beyond question. See, e.g., Barefield v. Byrd, 320 F. 2d 455, 457 (C. A. 5), certiorari denied, 376 U. S. 928. A statutory measure which provides, with precision, for "a limited judicial review" precludes a broad and unlimited jurisdiction for review. Caulfield v. United States Dept. of Agriculture, 293 F. 2d 217, 219 (C. A. 5), dismissed pursuant to stipulation, 369 U. S. 858. Congress may, for example, in establishing the criteria to be followed by administrative officials vest jurisdiction in a District Court to review

some, but not all, administrative decisions. Id. at 221. "The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise." Dismuke v. United States, 297 U. S. 167, 171-172. See also, Crane v. Hahlo,258 U. S. 142, 144-149; Switchmen's Union v. Board, 320 U. S. 297, 301; Slocumb v. Gray, 86 U. S. App. D. C. 5, 179 F. 2d 31, 34; Hobby v. Hodges, 215 F. 2d 754, 757-758 (C. A. 10).

In sum, the District Court properly concluded that it was without jurisdiction to review the issues raised by the plaintiffs with respect to the administrative decisions under the Food Stamp Act.

B. The Administrative Actions Involved Here Under the Food Stamp Program and the Commodity Distribution Program Constitute Unreviewable Administrative Discretion, and For This Additional Reason the Court Lacks Jurisdiction to Review the Issues in the Case

Plaintiffs assert (br. pp. xvii, xviii, and ixx) that, in the administration of the Family Food Assistance Programs, (1) the Secretary established "purchase prices for food stamps at a level which exceeds a household's 'normal expenditures for food,'" (2) under the terms of the program some people, irrespective of income, receive more food stamps than other people even though their "nutritional needs" are similar, (3) the Secretary failed to determine that "emergency situations" existed, and (4) the Secretary failed to give adequate weight to whether a person has "a secondary source" of food which is sufficient to enable the person to maintain a diet "consistent with the minimal nutritional standards established by the United States Department of Agriculture."

As we now show, however, these are all matters committed to agency discretion within the meaning of the Administrative Procedure Act, 5 U. S. C. Supp. III § 701.[3/]

3/ Although these points are not before this Court on the merits, the Secretary's determinations of which appellants complain were not unlawful. As to points (1) and (2) the Food Stamp Act of 1964 (7 U. S. C. § 2011 et seq.) was predicated on the Pilot Food Stamp Program which began in 1961. Similar methods of determining total food stamp allotments and participants' purchase requirements had been in effect prior to passage of the Act. The Pilot Program required that households pay an amount determined to be equivalent to their normal expenditures for food for a food stamp allotment worth more. The Act and its legislative history show that Congress expected and intended these procedures to be generally continued. 7 U. S. C. § 2016(b); Sen. Rept. No. 1124, 88th Cong., 2d Sess., pp. 2-9; H. R. Rept. No. 1228, 88th Cong., 2d Sess., pp. 2, 5-12. A sample schedule for issuance of stamps showing total allotments and purchase requirements was before Congress at the time of passage of the Act. 110 Cong. Rec. 7142. Provision was and is made in the plans of operation for adjustments in income to allow for unusual individual nonfood expenditures and for prompt recertification where income levels fluctuate (affidavit of Rodney E. Leonard, pp. 6-7). The population to be served in food stamp counties is in effect fixed by law, i.e., income standards applied must be "consistent with the income standards used by the State agency in administration of its Federally aided public assistance programs" (7 U. S. C. § 2014). Appropriations to carry out the program are limited. Within this framework those in deepest poverty do receive much more free food assistance than those better able to help themselves (supplementary affidavit of Orville L. Freeman, p. 6).

With respect to point (3), appellants in reality seek the operation of both programs in the same place at the same time for indefinite periods to meet problems of chronic need. The practical difficulties in this approach are discussed in the affidavit of Orville L. Freeman, pp. 4-5. The legislation does not contemplate the operation of both programs in the same area for an extended period (7 U. S. C. § 2013(b); Sen. Rept. No. 1124, 88th Cong., 2d Sess., p. 10; 110 Cong. Rec. 13925). Bills to effect such a change, H.R. 1268 and H.R. 1269, 90th Cong., 1st Sess., have never been reported out of Committee. The emergency FHA loans made available by the Secretary under 7 U. S. C. § 1961 meet other needs (supplementary affidavit of Orville L. Freeman, pp. 1-2).

As to point (4), for the reasons more fully set out, infra, pp. 26-32, the funds appropriated by § 32 and the commodities available under § 416 of the Agricultural Act of 1949, 7 U. S. C. § 1431, are limited to those in surplus supply. Despite this limitation, the spectrum of foods made available to needy households does meet most nutritional requirements.

(Continued)

1. Permissive Statutory Language Conferring Broad Discretion on an Administrative Official May Reflect the Unreviewability of Administrative Decisions

When the exercise of authority is committed to the discretion of an administrative official in circumstances which reflect the unreviewability of the administrative decisions, the courts are without jurisdiction to control the action of the executive even though it is alleged, in general conclusory language, that discretion has been abused. United States v. One 1961 Cadillac, 337 F. 2d 730, 733 (C. A. 6). The Administrative Procedure Act "expressly exempted matters committed to the discretion of an agency. We have no right to disregard this plain language." Ibid. Also the "Declaratory Judgment Act is not an independent source of federal jurisdiction, Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667, 671; the availability of such relief [under the Declaratory Judgment Act] presupposes the existence of a judicially remediable right." Schilling v. Rogers, 363 U. S. 666, 677.

Here, as in Schilling v. Rogers, 363 U. S. at 674, "the permissive terms in which the [applicable] provisions are drawn * * * persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch 'without the interference of the courts.'" The principle is applicable even when a constitutional issue

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3/ [continued] The quantity of each commodity made available to people under this program, in nearly every instance, exceeds the average per capita consumption of the commodity in the United States (affidavit of Rodney E. Leonard, pp. 10-12; supplementary affidavit of Rodney E. Leonard, pp. 4-5; affidavit of Orville L. Freeman, p. 5; supplementary affidavit of Orville L. Freeman, pp. 4-5).

is asserted. Ferry v. Udall, 336 F. 2d 706, 714 (C. A. 9), certiorari denied, 381 U. S. 904. A district court derives its jurisdiction "wholly from the authority of Congress," and a litigant cannot come "into the District Court under the direct authority of the Constitution." Mason v. Hitchcock, 108 F. 2d 134, 135 (C. A. 1). See also, Kline v. Burke Const. Co., 260 U. S. 226, 234; Trapp v. Goetz, 373 F. 2d 380, 383 (C. A. 10).

The courts are without authority to review administrative action which is committed to a governmental agency by the terms of a "permissive type" statute, whereas the courts have jurisdiction if the administrative action is pursuant to a "mandatory type" statute even though the latter involves some degree of discretion. Ferry v. Udall, 336 F. 2d at 712. See also, United States v. Wilbur, 283 U. S. 414, 418. "Since section 10 of the Administrative Procedure Act prohibits judicial review of agency action '* * * by law committed to agency discretion * * *,' we are without power to review the Secretary's decision in the case." Ferry v. Udall, 336 F. 2d at 711.

An exercise of administrative discretion may be unreviewable even though it involves "problems of statutory construction" and other "matters on which experts may disagree" involving "nice issues of judgment and choice" that "require the exercise of an informed discretion." Panama Canal Co. v. Grace Line, Inc., 356 U. S. 309, 317-318. Even under a non-permissive type statute, "where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. * * * We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the

responsibility for decision." Id. at 318. See also, United States v. Pink, 315 U. S. 203, 229-230; Chernock v. Gardner, 360 F. 2d 257, 259 (C. A. 3); Division 1267, Amalgamated Association of Street Employees v. Ordman, 116 U. S. App. D. C. 7, 320 F. 2d 729, 730; Smith v. United States, 375 F. 2d 243, 247-248 (C. A. 5), certiorari denied, 389 U. S. 841.

It is within the power of Congress to provide whether an administrative exercise of discretion is reviewable by the courts. Hobby v. Hodges, 215 F. 2d 754, 757 (C. A. 10); Chernock v. Gardner, 360 F. 2d at 259. It is axiomatic that, where Congress has authorized a public official to take such discretionary action as in his judgment is necessary or appropriate to carry out the legislative policy, the determination of the public official is not subject to judicial review in the absence of an express provision for such review. See, e.g., United States v. Binghamton Construction Co., 347 U. S. 171, 176-177; Z. & F. Assets Corp. v. Hull, 311 U. S. 470, 489; United States v. Bush & Co., 310 U. S. 371, 380; Adams v. Nagle, 303 U. S. 532, 540-542; Butte, A. & P. Ry. v. United States, 290 U. S. 127, 142-143; Heiner v. Diamond Alkali Co., 288 U. S. 502, 507; Williamsport Co. v. United States, 277 U. S. 551, 562-564; United States v. Chemical Foundation, 272 U. S. 1, 15; Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324-325; Hadden v. Merritt, 115 U. S. 25,27-28; Martin v. Mott, 12 Wheat. 19, 31-32; Dorsheimer v. United States, 7 Wall. 166, 174-175; Fahey v. O'Melveny & Myers, 200 F. 2d 420, 474 (C. A. 9), certiorari denied, 345 U. S. 952.

2. The Terms of the Food Stamp Act of 1964 Reflect the Intent and Special Reasons for the Unreviewability of the Administrative Actions Involved Here

As Professor Davis has pointed out, a statutory measure may reflect an "affirmative indication of legislative intent in favor of unreviewability" or there may appear "some special reason for unreviewability growing out of the subject matter or the circumstances." Davis, Administrative Law Treatise (1965 Pocket Parts), § 28.21.

The authority of the Secretary of Agriculture is set forth in the Food Stamp Act of 1964 by terms of general import. See, e.g., 7 U. S. C. §§ 2013(a), 2013(b), 2013(c), 2016(a), 2016(b), 2019(a), 2019(e), and 2019(f). For example, eligible households within the State are to be provided "with an opportunity more nearly to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment which shall have a greater monetary value than their normal expenditures for food." 7 U. S. C. § 2013(a). Participation in the program "shall be limited to those households whose income is determined to be a substantial limiting factor in the attainment of a nutritionally adequate diet." 7 U. S. C. § 2014(a). The "face value" of a coupon allotment "shall be in such amount as will provide such households with an opportunity more nearly to obtain a low-cost nutritionally adequate diet." 7 U. S. C. § 2016(a).

"All practicable efforts shall be made in the administration" of the program "to insure that participants use their increased food purchasing power to obtain those staple foods most needed in their diets, and particularly to encourage the continued use of those in abundant or

surplus supply so as not to reduce the total consumption of surplus commodities which have been made available through direct distribution." 7 U. S. C. § 2019(a). "In areas where a food stamp program is in effect, there shall be no distribution of federally owned foods to households under the authority of any other law except during emergency situations caused by a national or other disaster as determined by the Secretary." 7 U. S. C. § 2013(b).

The Secretary is authorized to issue "such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program." 7 U. S. C. § 2013(c).

These statutory terms manifestly reflect the intent for the administrative determinations to be unreviewable. There are, however, additional indicia of Congressional intent - all pointing the same way. As we have shown, supra, whenever the Congress intended for administrative action to be subject to judicial review it expressly said so, and accordingly conferred jurisdiction on the courts. 7 U. S. C. §§ 2020-2022. By carefully prescribing the boundaries of judicial review, it follows that administrative determinations in other respects, as those involved here, are unreviewable.

3. The Terms of the Statutory Provisions Which Authorize the Commodity Distribution Program Reflect the Intent and Special Reasons For the Unreviewability of the Administrative Actions Involved Here

As the court below pointed out, the Congressional purpose in the enactment of legislation for the Commodity Distribution Program "is to improve farm prices and income by removing price-depressing surpluses of agricultural commodities." The court went on to conclude that the "primary purpose" of the Commodity Distribution Program is to bring about "the improvement of the nation's agricultural economy by the removal of surplus stocks of agricultural commodities from the market. * * * In view of the Congressional policy and the total statutory scheme and objectives, the statute creates in plaintiff[s] no rights enforceable by this Court. This Court, therefore, lacks jurisdiction over the subject matter of this case."

The plaintiffs (br. p. 11) deny that the Congressional enactments "are intended to help farmers by distributing commodities," and assert (br. p. 15) that the statutory purpose is instead to provide food for "impoverished people" and "hungry people" and "persons in low-income groups." According to plaintiffs (br. p. 17), the "intent of Congress in formulating these programs was to assure that hunger in America would be alleviated. The commodity distribution program was to do this by direct handouts of food to needy persons * * *."

Since the Congressional purpose in providing for the Commodity Distribution Program is a relevant circumstance - although not the only relevant circumstance - in determining whether the issues set forth in the complaint involve unreviewable administrative discretion, it is

appropriate to turn at once to a consideration of the question as to the Congressional purpose.

(a) The Cardinal Purpose of Congress in Providing for the Commodity Distribution Program Is to Provide for the Removal of "Surplus" Agricultural Commodities From the Market

The legislation for the Commodity Distribution Program had its genesis in § 32 of the Act of August 24, 1935 (49 Stat. 774). This section of the Act of August 24, 1935, was enacted as part of comprehensive legislation designed to deal effectively with farm surpluses and depressed farm income. Section 32 appropriates for each fiscal year 30 per centum of the gross custom receipts for the preceding calendar year which "shall be maintained in a separate fund and shall be used by the Secretary of Agriculture only to (1) encourage the exportation of agricultural commodities and products thereof by the payment of benefits * * *; (2) encourage the domestic consumption of such commodities or products by diverting them * * * from the normal channels of trade and commerce; and (3) finance adjustments in the quantity planted or produced for market of agricultural commodities [underscoring supplied]." 49 Stat. 774. The measure, as amended, is in 7 U. S. C. § 612c.

The cardinal purpose of § 32 is to benefit the farmers. H. R. Rept. No. 1241, 74th Cong., p. 2. It is intended to "provide programs flexible enough to establish and maintain the rehabilitation of the country's agriculture." Ibid. See also, 79 Cong. Rec. 9486-9487. Here, as in United States v. Union Pacific R. Co., 91 U. S. 72, 79, the Act was the product of a period and "courts in construing a statute may with propriety

recur to the history of the times when it was passed." Statutory language "necessarily derives much of its meaning from the surrounding circumstances" (Civil Aero. Bd. v. Delta Air Lines, 367 U. S. 316, 323), and "statutes are construed by the courts with reference to the circumstances existing at the time of passage" (United States v. Wise, 370 U. S. 405, 411).

Soon after the enactment of this measure by Congress, Jesse W. Tapp, Associate Administrator, Agricultural Adjustment Administration, of the Department of Agriculture, explained that pursuant to the terms of the Act of Congress "we do not buy agricultural commodities unless there is a surplus and prices are relatively low. * * * We have tried to use the funds to meet the accumulated surpluses with the hope that it would become a part of the permanent agricultural policy; we are trying to deal with surplus agricultural commodities in an intelligent way." Hearings Before the Committee on Agriculture, House of Representatives, 75th Cong., 1st Sess., on S. 2439 (June 11, 1937), pp. 9, 24-25. This interpretation of the statute was reiterated in statements by Department officials in subsequent hearings before Congressional Committees. See, e.g., the Hearings Before the Senate Committee on the Agricultural Appropriation Bill for 1942, pp. 29 and 1110-1117.

"It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration. * * * [A]nd such construction is not to be overturned unless clearly wrong or unless a different construction is plainly required."

United States v. Jackson, 280 U. S. 183, 193. See also, Fawcus Machine Co. v. United States, 282 U. S. 375, 378; United States v. Atlantic Rfg. Co., 360 U. S. 19, 23-24, fn. 4.

A use of the funds thus appropriated by Congress for any purpose other than that established at the time of its enactment would be "a perversion of the intention of that law." Sen. Rept. No. 287 relative to the Agricultural Appropriation Bill for 1944, pp. 9-10.

In 1964 when the Appropriation Bill for the Department of Agriculture for the fiscal year 1965 was under consideration, the Committee on Appropriations of the House of Representatives emphasized the necessity for the retention by the Department of sufficient § 32 funds for surplus removal operations. The Committee stated:

> "Section 32 must be able to move into the market quickly, if necessary, with sufficient funds on hand to purchase a large enough quantity of commodities to remove surpluses and bolster prices. The diversion of these funds for other large uses could make Section 32 ineffective due to lack of funds." H. R. Rept. No. 1387, 88th Cong., 2d Sess., p. 34.

The Senate Committee on Appropriations also expressed similar concern, stating:

> "The section 32 authorization was designed to provide funds for surplus removal and to stabilize market prices for the perishable commodities. There has been a tendency in recent years since this is a permanent appropriation to misuse and even to abuse the basic purpose of this permanent authorization." Sen. Rept. No. 1331, 88th Cong., 2d Sess., p. 28. See also, Sen. Rept. No. 1320, 89th Cong., 2d Sess., pp. 36-37.

In its consideration of the § 32 item in the Department of Agriculture Appropriation Bill for the fiscal year 1968, the House Committee on Appropriations said:

> "Section 32 funds are used to encourage exportation and domestic consumption of agricultural products and contribute to stabilizing market prices either through announcements that the Department stands ready to enter the market, or by actual participation in the market. The extent to which funds actually will be obligated and expended for perishables and other surplus removal programs will depend upon the market situation which develops as peak marketing seasons approach. The type of program to be developed also will depend upon the kind and volume of the surpluses which exist at the time and the potential outlets. Generally, surpluses are removed from the market through purchases, which are then donated to schools, institutions and needy persons." H. R. Rept. No. 330, 90th Cong., 1st Sess., p. 39. See also, 110 Cong. Rec. 18692; 112 Cong. Rec. 15633.

The limitation contained in § 32 that "the amount that may be devoted during any fiscal year * * * to any one agricultural commodity or products thereof in such fiscal year shall not exceed 25 per centum of the funds available" (7 U. S. C. § 612c), and the requirement, added thereto by subsequent legislation, that the "sums appropriated under this section shall be devoted principally to perishable nonbasic agricultural commodities (other than those receiving price support under section 1446 of this title) and their products" demonstrate, within § 32 itself, that it is commodity oriented and the types of the commodities for which price assistance is to be first given. It goes without saying that price assistance is needed with respect to surplus commodities, and the provisions and structure of § 32 reflect that fact.

The assistance to be afforded under clause (2) of § 32 with respect to a commodity is to be by an undertaking which will "encourage the domestic consumption" thereof. The consumption of a commodity not in surplus is already assured as its regular markets will readily absorb the supply.

As we have shown, supra, the cardinal purpose of Congress in providing for the Commodity Distribution Program is to authorize the removal of surplus agricultural commodities from the market in order to strengthen farm income and prices. This specific and limited purpose on the part of Congress is underscored by subsequent legislation. A recent statutory enactment illustrates the consistent position Congress has maintained throughout the history of § 32 of the Act of August 24, 1935, with respect to utilization of funds appropriated by that section for programs which may only indirectly have an impact on the price of surplus agricultural commodities. Congress has specifically rejected or carefully limited the use of these funds for such other purposes. For example, although the Department of Agriculture began the Food Stamp Program with § 32 funds, in 1967 Congress specifically amended the Food Stamp Act of 1964 to provide that the program "shall be carried out only with funds appropriated from the general fund of the Treasury for that specific purpose and in no event shall it be carried out with funds derived from permanent appropriations." 7 U. S. C. § 2025(a). In reporting out this amendment, the Senate Committee on Agriculture and Forestry said:

> "Section 32 funds are appropriated for the purpose of removing surplus stocks of agricultural commodities, primarily perishable agricultural commodities, from the market whenever that action may become necessary. Ordinarily the amount appropriated exceeds the amount used, but it is appropriated so that it will be available when needed. Transfer of these funds to other purposes tends to remove this insurance." Sen. Rept. No. 289, 90th Cong., pp. 1-2.

This legislation enacted since § 32 was passed by Congress makes plain the central purpose of § 32. It has been held that a statute is to be interpreted "in the light of previous experience and prior enactments" (United States v. Congress of Ind. Organizations, 335 U. S. 106, 112-113), and that "a subsequent act [of the legislature] on the same subject affords complete demonstration of the legislative sense of its own [prior] language" and "is a direction to courts in expounding the provisions of the law" (Alexander v. Alexandria, 5 Cranch 1, 8). The courts do not suppose that a statutory measure is "without a distinct purpose on the part of Congress" (Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 475), and it is for the courts to "give coherence to what Congress has done within the bounds imposed by a fair reading of legislation" (Achilli v. United States, 353 U. S. 373, 379).

It is further significant that there is also distributed under the Commodity Distribution Program commodities made available pursuant to § 416 of the Agricultural Act of 1949, as amended, which directs the Secretary of Agriculture to support, through the Commodity Credit Corporation and other means available to him, by loans, purchases and other operations, the price to producers of a number of major agricultural commodities and authorizes the support of others. Section 407 of the Act (7 U. S. C. § 1427) specifies minimum prices at which the Corporation may dispose of its stocks of agricultural commodities in the domestic trade channels. Since this can result in the Corporation having excessive inventories, § 416 of that Act (7 U. S. C. Supp. III § 1431) authorizes the Corporation:

> "In order to prevent the waste of commodities * * * before they can be disposed of in normal domestic channels without impairment of the price support program or sold abroad at competitive world prices * * * in the case of food commodities to donate such commodities * * * to such State, Federal, or private agency or agencies as may be designated by the proper State or Federal authority and approved by the Secretary, for use in the United States in nonprofit school-lunch programs, in nonprofit summer camps for children, in the assistance of needy persons * * *."

Hence, these commodities must also, in effect, be "surplus" before they can be donated, and these commodities, as well as those distributed under the authority of clause (2) of § 32, have been so referred to in related legislation. See § 9 of the Act of September 6, 1958, as amended (72 Stat. 192, 80 Stat. 1588, 7 U. S. C. Supp. III § 1431(b)), authorizing distribution of these "surplus commodities" to trust territories; the Act of September 13, 1960, as amended (74 Stat. 899, 75 Stat. 411, 7 U. S. C. § 1431, Note), authorizing these "surplus foods" distributed to schools to be used in training students for home economics; and § 402 of the Mutual Security Act of 1954, as amended (73 Stat. 250, 22 U. S. C. § 1922), providing that the "surplus commodities" being made available for sale for foreign currencies or foreign grants may also be made available under clause (2) of § 32 and under § 416.

In sum, the overriding Congressional purpose - as shown by the original enactment in 1935, its legislative history, the long standing and consistent administrative interpretation, and subsequent Congressional legislation - is to authorize the Secretary of Agriculture to use the funds thus appropriated only for the purpose of removing from the market surplus agricultural commodities or products so as to strengthen farm income and prices.

(b) The Unreviewability of the Administrative Decisions Involved in the Case Is Shown by the Statutory Language and the Congressional Intent

The statutory terms - permissive in character - for the Commodity Distribution Program give to the Secretary of Agriculture broad discretion to establish a program for the removal from the market of surplus agricultural commodities or products so as to strengthen farm income and prices. There is no provision in the legislation for judicial review of the administrative determinations to achieve the Congressional goal, and there is no provision which gives jurisdiction to a district court. The statute provides that determinations by the Secretary as to what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption "shall be final." 7 U. S. C. § 612c. The sums thus appropriated by Congress "shall be expended for such one or more of the above specified purposes, and at such times, in such manner, and in such amounts as the Secretary of Agriculture finds will effectuate substantial accomplishment of any one or more of the purposes of this section." Ibid.

With respect to the second basic statutory enactment for the Commodity Distribution Program - viz., § 416 of the Agricultural Act of 1949, as amended (Public Law 89-808,, 80 Stat. 1538, 7 U. S. C. Supp. III § 1431) - it is provided by Congress that "[d]eterminations made by the Secretary under this Act shall be final and conclusive: Provided, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act." 7 U. S. C. § 1429. The fact of a single exception shows that no other

qualification of the absolute finality of administrative determination was intended by Congress. Richfield Oil Corp. v. State Board, 329 U. S. 69, 76. Any matter, as here, not within the proviso falls within the general rule. See, e.g., Moore Ice Cream Co. v. Rose, 289 U. S. 373, 377.

Additional support, were any needed, for our position - as to the unreviewability of the administrative decisions in this case - is found in the broad and permissive language of the statutory provisions. In § 32 of the Act of August 24, 1935, as amended (7 U. S. C. § 612c) three alternatives are set forth for use by the Secretary of Agriculture, viz., he may "encourage the export of agricultural commodities and products," or he may "encourage the domestic consumption of such commodities or products by diverting them * * * from the normal channels of trade and commerce or by increasing their utilization * * * among persons in low income groups," or he may "re-establish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption" (7 U. S. C. § 612c). The Secretary's determinations as to "what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption * * *" are given finality by the provisions of the Act. Ibid. Moreover, the sums appropriated under § 32 may be expended by the Secretary "at such times, in such manner, and in such amounts as [he] finds will effectuate substantial accomplishment of any one or more of the purposes of [the] section" (7 U. S. C. § 612c).

In the case of § 416 of the Agricultural Act of 1949 (7 U. S. C. § 1431) the Secretary may carry out the authority provided by that section "on such terms and under such regulations as the Secretary may deem in the public interest." Determinations made by the Secretary under the Agricultural Act of 1949 are final and conclusive provided that they are not inconsistent with the provisions of the Commodity Credit Corporation Charter Act, 15 U. S. C. § 714 et seq. (7 U. S. C. § 1429).

All of the legislative measures for this program reflect the intent and special reasons for the unreviewability of the administrative decisions involved here. The district court properly concluded these statutory enactments confer on the plaintiffs no rights reviewable by the court, and the court lacks jurisdiction over the subject matter of the case.

C. The Plaintiffs Under the Terms of the Food Stamp Act of 1964 and the Statutory Enactments For the Commodity Distribution Program Have No Interest - With Respect to the Issues in the Case - Which Is Protected by the Statutory Measures, and, Accordingly, the Plaintiffs Have No right to Maintain the Suit

The statutory measures involved here are not only permissive in character, but as we have shown, supra, the issues presented by the plaintiffs involve the exercise of unreviewable administrative discretion, and, in addition, the statutes preclude judicial review of the issues here. The statutes not only fail to confer on the plaintiffs a right to maintain this action, but the whole pattern of each statutory measure evinces an intention to circumscribe the scope of judicial review and precludes the courts from having jurisdiction with respect to the issues presented by the plaintiffs. In short, the plaintiffs - under the terms

of the statutes - have no interest or right, with respect to the issues in the case, which is protected by the statutory measures and the plaintiffs, accordingly, have no right to maintain the case. The Acts are manifestly differentiable from the statutory enactment in Hardin v. Kentucky Utilities Company, 390 U. S. 1, 5-7, involving rights "protected" by the Congressional legislation.

It "is for Congress to determine how the rights which it creates shall be enforced." Switchmen's Union v. Board, 320 U. S. 297, 301. The statutes create or establish no legally protected right in the plaintiffs, and, therefore, they have no standing to maintain this suit. It is only when a plaintiff has a legally protected right that he has standing to maintain suit when that right is adversely affected by governmental action. Tennessee Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 137-138; Alabama Power Co. v. Ickes, 302 U. S. 464, 475-480; United Milk Producers of New Jersey v. Benson, 96 U. S. App. D. C. 227, 225 F. 2d 527, 529; Kansas City Power & Light Co. v. McKay, 96 U. S. App. D. C. 273, 225 F. 2d 924, 934, certiorari denied, 350 U. S. 884. Mere economic disadvantage which results from allegedly unlawful action by the Government does not give a person standing to sue. Perkins v. Lukens Steel Co., 310 U. S. 113, 125; Fulton Iron Co. v. Larson, 84 U. S. App. D. C. 39, 171 F. 2d 994, 998, certiorari denied, 336 U. S. 903.

It has been held that a municipality has no standing to challenge a minimum price order for coal even though the municipality is a large consumer of coal. City of Atlanta v. National Bituminous Coal Comm., 26 F. Supp. 606 (3-Judge Court, D. C.), affirmed sub nom., City of Atlanta

v. Ickes, "on the ground that the appellant has no standing to maintain the suit." 308 U. S. 517. It is "hornbook law" that a person "cannot be heard to interfere with the process of executive administration unless his specific, private right has been or is about to be invaded." Fulton Iron Co. v. Larson, 84 U. S. App. D. C. 39, 171 F. 2d at 998, supra. It is "not sufficient that plaintiff as a member of the public desires a law to be correctly administered." Railway Express Agency v. Kennedy, 189 F. 2d 801, 804 (C. A. 7), certiorari denied, 342 U. S. 830.

The review provisions of the Administrative Procedure Act do not give standing to the plaintiffs or afford a basis for judicial review. That measure (formerly 5 U. S. C. § 1009(a)) applies with respect to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute * * *." 5 U. S. C. Supp. III § 702. As we have shown, supra, the plaintiffs have not suffered a "legal wrong," and, therefore, there is no basis for their reliance on the Administrative Procedure Act. Moreover, the plaintiffs are not "adversely affected or aggrieved * * * within the meaning of a relevant statute" (5 U. S. C. Supp. III § 702), and, therefore, those provisions in the Administrative Procedure Act do not create in the plaintiffs standing to maintain this action. The statutory language expressly applies - as held in numerous cases - only to a person adversely affected or aggrieved within the meaning of a relevant statute. Fahey v. O'Melveny & Myers, 200 F. 2d 420, 478 (C. A. 9), certiorari denied, 345 U. S. 952; Duba v. Schuetzle, 303 F. 2d 570, 574-576 (C. A. 8); Pennsylvania Railroad Co. v. Dillon,

118 U. S. App. D. C. 257, 335 F. 2d 292, 294-297, certiorari denied sub nom., American-Hawaiian Steamship Co. v. Dillon, 379 U. S. 945.

"Each statute in question must be examined individually" in determining whether the review procedures of the Administrative Procedure Act are relevant. Heikkila v. Barber, 345 U. S. 229, 233. The examination of the statutory measures for the programs here plainly shows that the issues presented by the plaintiffs are not within the terms of the statutes for the Food Stamp Program and the Commodity Distribution Program.

D. The Court Lacks Jurisdiction - With Respect to the Issues Under the Food Stamp Program and the Commodity Distribution Program - Since the Plaintiffs Seek in Effect to Maintain a Suit Against the United States Which Has Not Consented to be Sued

The Government's answer filed in the district court alleges, by way of defense, that the plaintiffs are undertaking "to maintain an unconsented suit against the United States over which this Court has no jurisdiction." The district court concluded that the plaintiffs have "no rights enforceable by this Court," and that the court "lacks jurisdiction over the subject matter of this case."

This suit was filed against certain administrative officials but not against the United States. The plaintiffs seek, however, to obtain an adjudication relative to their rights with respect to funds appropriated by Congress.

Where, as here, the defendants are officers of the United States, the suit is deemed to be against the United States if the judgment would operate against the sovereign. Hawaii v. Gordon, 373 U. S. 57, 58.

Here, as in Hawaii v. Gordon, supra, "the order requested would require * * * affirmative action [by a governmental official], affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States" (ibid.). A judgment operates against the sovereign if the judgment sought would expend itself on the public Treasury or domain. Larson v. Domestic & Foreign Corp., 337 U. S. 682, 684-704. "There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, 'the interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief * * *.'" Id. at 704.

The United States, however, can be sued only to the extent and in the manner set forth by Congress in a statutory measure. United States v. Sherwood, 312 U. S. 584, 586-592. "The United States, as sovereign, is immune from suit save as it consents to be sued * * *, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Id. at 586. Since the consent to be sued is a relinquishment of sovereign immunity, any such statutory measure "must be strictly interpreted." Id. at 590.

A claim of error in the exercise of delegated power is not sufficient to give a court jurisdiction in a case in which the proceeding against an administrative official seeks in effect a judgment with respect to

appropriated funds or Government property. Larson v. Domestic & Foreign Corp., 337 U. S. 682, 689-690, 693; Goldberg v. Daniels, 231 U. S. 218, 221-222; American Dredging Co. v. Cochrane, 89 U. S. App. D. C. 88, 190 F. 2d 106, 108-109; New Haven Public Schools v. General Services Admin., 214 F. 2d 592, 593-594 (C. A. 7); West Coast Exploration Co. v. McKay, 93 U. S. App. D. C. 307, 213 F. 2d 582, 608, certiorari denied, 347 U. S. 989.

This principle of sovereign immunity applies in all cases in which the United States Treasury would be required to make pecuniary satisfaction as a result of a judgment entered for the plaintiffs. Reconstruction Finance Corp. v. MacArthur Mining Co., 184 F. 2d 913, 917-918 (C. A. 8), certiorari denied, 340 U. S. 943; Transcontinental & Western Air v. Farley, 71 F. 2d 288, 290 (C. A. 2), certiorari denied, 293 U. S. 603; Thomason v. Works Projects Admin., 138 F. 2d 342, 343 (C. A. 9). Also, where the suit is against an administrative official but is designed to "control or direct his action * * * in respect of matters confided to his discretion, the suit is one against the United States and may not be maintained without its consent to be sued." Payne v. Fite, 184 F. 2d 977, 979 (C. A. 5). See also, Young v. Anderson, 81 U. S. App. D. C. 379, 160 F. 2d 225, 227-228, certiorari denied, 331 U. S. 824.

The plaintiffs' reliance on 28 U. S. C. § 1331 is misplaced since that statutory measure does not waive the sovereign immunity of the United States. Cotter Corp. v. Seaborg, 370 F. 2d 686, 692, fn. 15 (C. A. 10); Commonwealth of Mass. v. Connor, 248 F. Supp. 656, 658 (D. Mass.), affirmed, 366 F. 2d 778 (C. A. 1). Nor does 28 U. S. C. § 1343 - relied on by the plaintiffs - provide a foundation for this suit

since that statutory measure grants jurisdiction only with respect to cases arising under acts which apply to discriminatory or injurious "state action" under the Fourteenth Amendment. Davis v. Foreman, 251 F. 2d 421, 422 (C. A. 7), certiorari denied, 356 U. S. 974; Hackin v. Lockwood, 361 F. 2d 499, 502 (C. A. 9), certiorari denied, 385 U. S. 960. Similarly, the plaintiffs' reliance on 28 U. S. C. § 1337 affords no basis for the suit since the statute relates to cases in which a legal right of a plaintiff is being violated (General Committee v. Missouri-Kansas-Texas Co., 320 U. S. 323, 337), and, also, it must appear that the Federal statute involved will have an adverse effect upon a "legal right" of a plaintiff (Florida East Coast Ry. Co. v. Jacksonville Terminal Co., 328 F. 2d 720, 722 (C. A. 5), certiorari denied, 379 U. S. 830).

Finally, 28 U. S. C. § 1361 clearly does not confer jurisdiction over an otherwise unconsented suit against the United States. Seebach v. Cullen, 224 F. Supp. 15, 17 (N. D. Calif.), affirmed, 338 F. 2d 663 (C. A. 9), certiorari denied, 380 U. S. 972; Sprague Electric Co. v. Tax Court, 340 F. 2d 947, 947-948 (C. A. 1).

In short, here, as in Mine Safety Co. v. Forrestal, 326 U. S. 371, 373-375, the plaintiffs are in effect attempting to maintain a suit against the United States, an indispensable party, and the United States has not consented to be sued.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

Relevant Statutes

1. Section 32 of the Act of August 24, 1935, as amended, 7 U.S.C. § 612c.

There is hereby appropriated for each fiscal year beginning with the fiscal year ending June 30, 1936, an amount equal to 30 per centum of the gross receipts from duties collected under the customs laws during the period January 1 to December 31, both inclusive, preceding the beginning of each such fiscal year. Such sums shall be maintained in a separate fund and shall be used by the Secretary of Agriculture only to (1) encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation or by payments to producers in connection with the production of that part of any agricultural commodity required for domestic consumption; (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce or by increasing their utilization through benefits, indemnities, donations or by other means, among persons in low-income groups as determined by the Secretary of Agriculture; and (3) reestablish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption. Determinations by the Secretary as to what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption shall be final.

The sums appropriated under this section shall be expended for such one or more of the above-specified purposes, and at such times, in such manner, and in such amounts as the Secretary of Agriculture finds will effectuate substantial accomplishment of any one or more of the purposes of this section. Notwithstanding any other provision of this section, the amount that may be devoted, during any fiscal year after June 30, 1939, to any one agricultural commodity or the products thereof in such fiscal year, shall not exceed 25 per centum of the funds available under this section for such fiscal year. The sums appropriated under this section shall be devoted principally to perishable non-basic agricultural commodities (other than those receiving price support under title II of the Agricultural Act of 1949) and their products. The sums appropriated under this section shall, notwithstanding the provisions of any other law, continue to remain available for the purposes of this section until expended; but any excess of the amount remaining unexpended at the end of any fiscal year over $300,000,000 shall, in the same manner as though it had been appropriated for the service of such fiscal year, be subject to

the provisions of section 3690 of the Revised Statutes (U.S.C., title 31, sec. 712), and section 5 of the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending June thirtieth, eighteen hundred and seventy-five and for other purposes" (U.S.C., title 31, sec. 714).

2. 15 U.S.C. § 713c in relevant part:

* * * *

In carrying out clause (2) of section 32, the funds appropriated by said section may be used for the purchase, without regard to the provisions of existing law governing the expenditure of public funds, of agricultural commodities and products thereof, and such commodities, as well as agricultural commodities and products thereof purchased under the preceding paragraph of this section, may be donated for relief purposes and for use in nonprofit summer camps for children.

3. Section 412 of the Agricultural Act of 1949, as amended, 7 U.S.C. § 1429.

Determinations made by the Secretary under this Act shall be final and conclusive: Provided, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

4. Section 416 of the Agricultural Act of 1949, as amended, 7 U.S.C. § 1431.

In order to prevent the waste of commodities whether in private stocks or acquired through price-support operations by the Commodity Credit Corporation before they can be disposed of in normal domestic channels without impairment of the price-support program or sold abroad at competitive world prices, the Commodity Credit Corporation is authorized, on such terms and under such regulations as the Secretary may deem in the public interest: (1) upon application, to make such commodities available to any Federal agency for use in making payment for commodities not produced in the United States; (2) to barter or exchange such commodities for strategic or other materials as authorized by law; (3) in the case of food commodities to donate such commodities to the Bureau of Indian Affairs and to such State, Federal, or private agency or agencies as may be designated by the proper State or Federal authority and approved by the Secretary, for use in the United States in nonprofit school-lunch programs, in nonprofit summer camps for children, in the assistance of needy persons, and in charitable institutions, including hospitals, to the extent that needy persons are served. In the case of (3) the Secretary shall obtain such assurance as he deems necessary that the recipients thereof will not diminish their normal expenditures for food by reason of such donation. In order to facilitate the appropriate

disposal of such commodities, the Secretary may from time to time estimate and announce the quantity of such commodities which he anticipates will become available for distribution under (3). The Commodity Credit Corporation may pay, with respect to commodities disposed of under this section, reprocessing, packaging, transporting, handling, and other charges accruing up to the time of their delivery to a Federal agency or to the designated State or private agency. In addition, in the case of food commodities disposed of under this section, the Commodity Credit Corporation may pay the cost of processing such commodities into a form suitable for home or institutional use, such processing to be accomplished through private trade facilities to the greatest extent possible. For the purpose of this section the terms "State" and "United States" include the District of Columbia and any Territory or possession of the United States.

5. The Food Stamp Act of 1964, 7 U.S.C. § 2011 et seq., in relevant part:

7 U.S.C. § 2013.

(a) The Secretary is authorized to formulate and administer a food stamp program under which, at the request of an appropriate State agency, eligible households within the State shall be provided with an opportunity more nearly to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment which shall have a greater monetary value than their normal expenditures for food. The coupons so received by such households shall be used only to purchase food from retail food stores which have been approved for participation in the food stamp program. Coupons issued and used as provided in this Act shall be redeemable at face value by the Secretary through the facilities of the Treasury of the United States.

(b) In areas where a food stamp program is in effect, there shall be no distribution of federally owned foods to households under the authority of any other law except during emergency situations caused by a national or other disaster as determined by the Secretary.

(c) The Secretary shall issue such regulations, not inconsistent with this Act, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program.

7 U.S.C. § 2014.

(a) Participation in the food stamp program shall be limited to those households whose income is determined to be a substantial limiting factor in the attainment of a nutritionally adequate diet.

(b) In complying with the limitation on participation set forth in subsection (a) above, each State agency shall establish standards to determine the eligibility of applicant households. Such standards shall include maximum income limitations consistent with the income standards used by the State agency in administration of its federally aided public assistance programs. Such standards also shall place a limitation on the resources to be allowed eligible households. The standards of eligibility to be used by each State for the food stamp program shall be subject to the approval of the Secretary.

7 U.S.C. § 2016.

(a) The face value of the coupon allotment which State agencies shall be authorized to issue to households certified as eligible to participate in the food stamp program shall be in such amount as will provide such households with an opportunity more nearly to obtain a low-cost nutritionally adequate diet.

(b) Households shall be charged such portion of the face value of the coupon allotment issued to them as is determined to be equivalent to their normal expenditures for food.

* * * *

7 U.S.C. § 2019.

(a) All practicable efforts shall be made in the administration of the food stamp program to insure that participants use their increased food purchasing power to obtain those staple foods most needed in their diets, and particularly to encourage the continued use of those in abundant or surplus supply so as not to reduce the total consumption of surplus commodities which have been made available through direct distribution. In addition to such steps as may be taken administratively, the voluntary cooperation of existing Federal, State, local, or private agencies which carry out informational and educational programs for consumers shall be enlisted.

* * * *

(c) In the certification of applicant households for the food stamp program there shall be no discrimination against any household by reason of race, religious creed, national origin, or political beliefs.

* * * *

(e) The State agency of each State desiring to participate in the food stamp program shall submit for approval a plan of operation specifying the manner in which such program will be conducted within the State, the political subdivisions within the State in which the

State desires to conduct the program, and the effective dates of participation by each such political subdivision. In addition, such plan of operation shall provide, among such other provisions as may by regulation be required, the following: (1) the specific standards to be used in determining the eligibility of applicant households; (2) that the State agency shall undertake the certification of applicant households in accordance with the general procedures and personnel standards used by them in the certification of applicants for benefits under the federally aided public assistance programs; (3) safeguards which restrict the use or disclosure of information obtained from applicant households to persons directly connected with the administration or enforcement of the provisions of this Act or the regulations issued pursuant to this Act; and (4) for the submission of such reports and other information as may from time to time be required. In approving the participation of the subdivisions requested by each State in its plan of operation, the Secretary shall provide for an equitable and orderly expansion among the several States in accordance with their relative need and readiness to meet their requested effective dates of participation.

(f) If the Secretary determines that in the administration of the program there is a failure by a State agency to comply substantially with the provisions of this Act, or with the regulations issued pursuant to this Act, or with the State plan of operation, he shall inform such State agency of such failure and shall allow the State agency a reasonable period of time for the correction of such failure. Upon the expiration of such period, the Secretary shall direct that there be no further issuance of coupons in the political subdivisions where such failure has occurred until such time as satisfactory corrective action has been taken.

* * * *

7 U.S.C. § 2020.

Any approved retail food store or wholesale food concern may be disqualified from further participation in the food stamp program on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this Act, or of the regulations issued pursuant to this Act. Such disqualification shall be for such period of time as may be determined in accordance with regulations issued pursuant to this Act. This action of disqualification shall be subject to review as provided in section 13 of this Act.

7 U.S.C. § 2021.

The Secretary shall have the power to determine the amount of and settle and adjust any claim and to compromise or deny all or part of any such claim or claims arising under the provisions of this Act or the regulations issued pursuant to this Act.

7 U.S.C. § 2022.

Whenever--

(a) an application of a retail food store or wholesale food concern to participate in the food stamp program is denied,

(b) a retail food store or a wholesale food concern is disqualified under the provisions of section 11 of this Act, or

(c) all or part of any claim of a retail food store or wholesale food concern is denied under the provisions of section 12 of this Act, notice of such administrative action shall be issued to the retail food store or wholesale food concern involved. Such notice shall be delivered by certified mail or personal service. If such store or concern is aggrieved by such action, it may, in accordance with regulations promulgated under this Act, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store or concern fails to submit information in support of its position after filing a request, the administrative determination shall be final. If such a request is made by such store or concern, such information as may be submitted by the store or concern, as well as such other information as may be available, shall be reviewed by the person or persons designated, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect fifteen days after the date of the delivery or service of such final notice of determination. If the store or concern feels aggrieved by such final determination he may obtain judicial review thereof by filing a complaint against the United States in the United States district court for the district in which he resides or is engaged in business, or in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon him, requesting the court to set aside such determination. The copy of the summons and complaint required to be delivered to the official or agency whose order is being attacked shall be sent to the Secretary or such person or persons as he may designate to receive service of process. The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless an application to the court on not less than ten days' notice, and after hearing

thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.

7 U.S.C. § 2025.

(a) To carry out the provisions of this Act, there is hereby authorized to be appropriated not in excess of $75,000,000 for the fiscal year ending June 30, 1965; not in excess of $100,000,000 for the fiscal year ending June 30, 1966; and not in excess of $200,000,000 for the fiscal year ending June 30, 1967; not in excess of $200,000,000 for the fiscal year ending June 30, 1968; not in excess of $315,000,000 for the fiscal year ending June 30, 1969; not in excess of $340,000,000 for the fiscal year ending June 30, 1970; not in excess of $170,000,000 for the six months ending December 31, 1970; and not in excess of such sum as may hereafter be authorized by Congress for any subsequent fiscal period. Such portion of any such appropriation as may be required to pay for the value of the coupon allotments issued to eligible households which is in excess of the charges paid by such households for such allotments shall be transferred to and made a part of the separate account created under section 7(d) of this Act. This Act shall be carried out only with funds appropriated from the general fund of the Treasury for that specific purpose and in no event shall it be carried out with funds derived from permanent appropriations. On or before January 20 of each year, the Secretary shall submit to Congress a report setting forth operations under this Act during the preceding calendar year and projecting needs for the ensuing calendar year.

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